Petition

81-2090

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

CITY OF SAULT STE. MARIE, MICHIGAN,
Petitioner,

v.

JAMES G. WATT, *et al.*,

and

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in view of *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), the City has the authority to enforce its land use regulations on off-reservation lands properly acquired in trust under § 5 of the 1934 Indian Reorganization Act (25 U.S.C. § 465).

2. Whether the decision of the Department of the Interior to accept land in trust for a tribe under § 5 of the 1934 Indian Reorganization Act, can be upheld where the Department did not properly construe the scope of authority for acquiring lands under that section.

3. Whether the decision of the Department of the Interior to extend eligibility as a "tribe" within the meaning of § 19 of the 1934 Indian Reorganization Act (25 U.S.C. § 479) to a particular group can be upheld where the Department did not properly construe the scope of eligibility under that section.

4. Whether the City, as a municipal corporation, is—like a private corporation—entitled to the procedural protections of the Due Process Clause of the Fifth Amendment for the loss of governmental powers such as taxation, and whether the requirements of Due Process were met in this case when the City was not provided with any opportunity to be heard on the proposed trust acquisition.

5. Whether off-reservation lands properly acquired in trust under § 5 of the 1934 Indian Reorganization Act are, without any further congressional involvement, "Indian Country" within the meaning of 18 U.S.C. § 1151.

THE LIST OF PARTIES BELOW

The parties to the proceedings in the Court of Appeals were the City of Sault Ste. Marie, Michigan, the Secretary of the Interior James G. Watt, the Assistant Secretary of the Interior for Indian Affairs, the United States Department of the Interior, the Bureau of Indian Affairs, and the Sault Ste. Marie Tribe of Chippewa Indians.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, City of Sault Ste. Marie, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on November 25, 1981.

OPINIONS BELOW

Three Memorandum Opinions were issued by the District Court. The first was filed with an accompanying Order on August 31, 1978, and is reported at 458 F. Supp. 465. The second Memorandum Opinion of the District Court was filed

with an accompanying Judgment on August 29, 1980, and is reported at 532 F. Supp. 157. On a motion for partial reconsideration the Opinion and Judgment were modified by a third Memorandum Opinion filed with an accompanying Order on December 12, 1980. This last Memorandum Opinion is also reported at 532 F. Supp. 157. The Court of Appeals, without opinion, issued its judgment on November 25, 1981. This judgment is unreported. On January 12, 1982, a timely filed petition by the City for a rehearing with suggestion for rehearing *en banc* was denied. The preceding opinions, judgments and orders appear in the Appendix in reverse chronological order at 1a through 39a.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The Judgment of the Court of Appeals was entered on November 25, 1981. On January 12, 1982, the City's timely filed petition for rehearing was denied. The time for filing this petition for a writ of certiorari was extended to May 12, 1982, by Order of the Chief Judge, dated March 18, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

THE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The relevant portions of the pertinent Constitutional Provisions, Statutes, and Regulations are contained in the Appendix at 40a *et seq.*

STATEMENT OF THE CASE

A. The Factual Background

The City of Sault Ste. Marie, Michigan—a municipality incorporated under the Constitution and Laws of the State of Michigan (J.A. 227)[1]—is located on the Canadian border in the northeastern portion of the Upper Peninsula (J.A. 253). The underlying controversy began in late 1976 when it was

[1] "J.A." refers to Joint Appendix filed in the Court of Appeals.

made known publicly that the federal government was going to take land located within the City in trust for the group known as the Sault Ste. Marie Tribe of Chippewa Indians [hereinafter Tribe]. On March 14, 1977, title to an approximately 76-acre tract located within the City was accepted in trust under § 5 of the 1934 Indian Reorganization Act (48 Stat. 984), 25 U.S.C. § 465, by the Director of the Minneapolis Area Office, acting pursuant to the delegation of the Secretary of the Interior (J.A. 230).[2] Now that the tract is held in trust, it is expressly exempted from State and local real property taxation.[3] *See* 25 U.S.C. § 465. Construction of a multi-unit housing project is currently under way on the 76-acre tract (J.A. 232, 256). It is the understanding of the City that the project will, upon completion, consist of approximately 85 single family dwellings and duplex units.[4] Funding of this project is not contingent upon the 76-acre tract being held in trust by the United States for the Tribe (J.A. 232 & App. at 12a n.4), and is, therefore, in no way threatened by the outcome of this case. *See also* 24 C.F.R. § 805.218.

Although the acquisition of additional land in trust is of considerable concern to the City because of the potential harm this and other trust acquisitions may cause to its already depleted tax base (J.A. 253-54), its primary concern has been, throughout this controversy, the potential jurisdictional implications of trust status (App. at 12a).[5] Based upon the official policy of the Respondents, these implications are indeed significant. Specifically, throughout this litigation the Respondents have claimed the following: First, that upon inhabitation, the tract will become a dependent Indian community within the meaning of 18 U.S.C. § 1151(b) and will, therefore, constitute

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[2] This tract was first acquired by the Tribe with its own funds (J.A. 231, 237).

[3] Prior to its acquisition in trust, the 76-acre tract was not exempt from State and local real property taxation (J.A. 236).

[4] It has been agreed that the City will provide water and other municipal services to the project (J.A. 255).

[5] This is of no little moment to the City because of the number of municipal codes, regulations, and laws which City officials regularly enforce within City limits (J.A. 257).

"Indian Country" for purposes of federal and tribal jurisdiction (J.A. 360); and second, that based upon 58 I.D. 52 (1942) and 25 C.F.R. § 1.4, the City's land use laws are inapplicable to the 76-acre tract even though located outside an existing Indian reservation area because title to that tract is held in the name of the United States in trust (J.A. 363). Moreover, in the Court of Appeals, the Respondents claimed that the 76-acre tract became an existing Indian reservation upon its acquisition in trust. Whether or not this claim is correct, reservation status is nevertheless readily attainable since that tract could be administratively declared to be a reservation, pursuant to § 7 of the Indian Reorganization Act (25 U.S.C. § 467), at any time.

B. Proceedings Below

The instant action was instituted on August 10, 1977, by the City of Sault Ste. Marie, Michigan and three of its residents pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701 *et seq.*—in order to seek judicial review of the action taken by the Department of the Interior in acquiring the 76-acre tract in trust for the Tribe under § 5 of the 1934 Indian Reorganization Act, 25 U.S.C. § 465 (J.A. 1). The following relief was sought: A declaratory judgment that the 76-acre tract was not lawfully accepted in trust and the issuance of a permanent injunction enjoining the Defendants from accepting in trust any other land located within the City; and, in the event that the tract was properly accepted in trust, a declaratory judgment that the City has full governmental authority over the tract (J.A. 20-21).

On March 10, 1978, the Defendants moved to dismiss the Complaint on grounds that (1) the United States was an indispensable party, (2) the Sault Ste. Marie Tribe was also an indispensable party, and (3) the Complaint, in certain respects, failed to state a claim upon which relief could be granted (J.A. 5). By Memorandum Opinion and Order filed August 31, 1978 (App. at 25a-39a), the District Court dismissed the individual Plaintiffs for lack of standing; it also dismissed certain subsidiary claims for failure to state a claim upon which relief could be

granted. In all other respects, the District Court retained jurisdiction of the action. [6] No aspect of the District Court's ruling on the motion to dismiss was before the Court of Appeals for review.

On January 4, 1980, the City filed a motion for summary judgment (J.A. 10), in which it was argued that the 76-acre tract was not properly taken in trust for the following reasons: (1) The Department of the Interior did not properly construe the scope of eligibility for a "tribe" under § 19 of the 1934 Indian Reorganization Act (25 U.S.C. § 479), and there was not a reasonable basis in the record for concluding that the Tribe met the requirements under that Act; (2) the Department of the Interior did not properly construe the scope of authority for acquiring lands in trust under § 5 of the Indian Reorganization Act (25 U.S.C. § 465); and (3) the City—as a municipal corporation—is entitled to the protections of the Due Process Clause of the Fifth Amendment and it was not accorded the process due it in the instant case. In the event the Court found that the tract at issue had been properly acquired in trust, the City further argued that it had the authority to enforce its land use laws on the tract and that it had criminal jurisdiction over the trust tract since that tract was not "Indian Country" within the meaning of 18 U.S.C. § 1151.[7] The Defendants subsequently filed a cross-motion for summary judgment (J.A. 10). By Memorandum Opinion and Judgment filed August 29, 1980 (App. at 9a-24a), the District Court denied the City's motion for summary judgment on all issues, granted the Defendants' motion as to the issues of the acceptance of the 76-acre tract in trust and the applicability of the City's land use regulation to that tract, and dismissed the issue of the applicability of the City's criminal jurisdiction to the 76-acre tract. This decision was subsequently modified by Memorandum Opinion and Order filed December 12, 1980 (App. at 5a-8a), in which the City's motion for partial reconsideration was denied.

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[6] Subsequently, the Tribe was granted permission to intervene as a party defendant (J.A. 6).

[7] Throughout this case, the Respondents have not claimed that the tract would be exempt from the City's land use regulation or that the tract was "Indian Country" if the tract was *not* properly held in trust.

On appeal, the Court of Appeals for the District of Columbia Circuit, without opinion, affirmed the decision of the lower court, stating that it was "in agreement with the result reached by the District Court in this case, generally for the reasons stated in the District Court's Memorandum Opinion filed August 29, 1980. . . ." Judgment filed November 25, 1981 (footnote omitted) (App. at 3a-4a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS ON RECURRING ISSUES OF IMPORTANCE.

1. The acquisition of land in trust is a program of national scope having a significant impact on state and local governments.

In general, the acquisition of trust land for individual Indians and tribes is a program of national scope. From 1970 to 1980, lands held in trust for Indians in the United States increased from 50,340,034 acres to 51,889,945 acres reflecting a *net* addition of 1,549,911 acres, or an area larger than the State of Delaware. *Compare* Bureau of Indian Affairs—Office Of Trust Responsibilities, *Annual Report of Indian Lands* at 1 (1970) *with* Bureau of Indian Affairs—Office of Trust Responsibilities, *Annual Report of Indian Lands* at 1 (1980). And, in the context of trust land acquisition, the Manual of the Bureau of Indian Affairs states that the Indian Reorganization Act is the "statute of broadest application."[8] 54 IAM 2.2.1F (J.A. 224). *See also* F. Cohen, *Handbook of Federal Indian Law* at

[8] For example, from 1934 to 1975, almost 600,00 acres of land were acquired under § 5 with congressionally appropriated funds alone (totalling approximately six million dollars). *See* Taylor, Theodore W., *Report on Purchase of Indian Land and Acres of Indian Land In Trust, 1934-1975* at 4-5, 49 (BIA 1976). No statistics are available as to the amount of land acquired under § 5 with funds from other sources or by the other means of acquisition permitted by that section. It is believed, however, that in view of the broad applicability of the Act and the relatively small amount of money which Congress has appropriated for acquisitions, the amount of land otherwise acquired under § 5 far exceeds that acquired with the congressionally appropriated money.

45 (1982 ed.) [hereinafter cited as Cohen]. Indeed, it is the only acquisition provision of general application. *See* 25 C.F.R. Part 120a (1981) (statement of Authority). Furthermore, trust land acquisition has not been generally confined to existing reservation areas: Of the lands presently held in trust for Indians, a significant amount is unquestionably located off-reservation. *See, e.g.,* Bureau of Indian Affairs—Office of Trust Responsibilities, *Annual Report of Indian Lands* at 4-42 (1980). *Cf.* Cohen, *supra* at 45. Nor can it be said that the nousing project at issue in this case is unique as the record shows that off-reservation lands have been acquired in trust for Indian housing projects in other localities (J.A. 57, 732).[9] *See also United States* v. *South Dakota,* 665 F.2d 837 (8th Cir. 1981), *petition for cert. filed,* No. 81-1910 (March 8, 1982); *United States* v. *Mound,* 477 F. Supp. 156 (D.S.D. 1979). *Cf.* 25 C.F.R. § 120a.3(a)(3) (1981). It is evident, then, that the problems presented by this case are by no means localized or insignificant but are in fact of national importance. Therefore, because of the magnitude of the government's acquisition program, and the significant impact this program has on state and local governments jurisdictionally, it is important that the Court affirmatively address and resolve the issues regarding trust land acquisition and the resultant jurisdictional issues presented by this case.

2. Applicability of state and local land use regulations to off-reservation § 5 trust land.

The decision of the Court of Appeals upholds the ruling of the District Court sustaining the Department of the Interior's long standing policy (*see, e.g.,* 58 I.D. 52 (1942)) that state and local land use laws are unenforceable on non-reservation Indian trust lands. App. at 21a-24a. This holding squarely conflicts with the applicable decisions of this Court, particularly

[9] As of 1981, there were about 170 separate Indian Housing Authorities operating approximately 41,400 Indian housing units. *See* U.S. Department of Housing and Urban Development, *Annual Report to Congress on Indian and Alaskan Native Housing and Community Development Programs* at 6 (1981). In addition, 15,330 more units of such housing will be made available for occupancy in the next three years. *See id.*

Mescalero Apache Tribe v. *Jones*, 411 U.S. 145 (1973). And, as noted above, the impact of such a ruling is not limited to the trust tract at issue since there is a significant amount of off-reservation land already held in trust, and since more and more land, both on and off-reservation, is being acquired in trust annually.

It has long been recognized that state law is generally inapplicable to Indians and their property while within an Indian reservation. *See, e.g., White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 144 (1980); *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n.2 (1975). *See also Mescalero Apache Tribe* v. *Jones, supra*, 411 U.S. at 148. At the same time, it is equally well recognized that outside the boundaries of a reservation, Indians and their property are subject to estate law absent express federal law to the contrary. *See, e.g., White Mountain Apache Tribe* v. *Bracker, supra*, 448 U.S. at 144 n.11; *Mescalero Apache Tribe* v. *Jones, supra*, 411 U.S. at 148-49. In the District Court, it was undisputed that the trust tract at issue here was not located within an Indian reservation (J.A. 237, 675 & 730). It follows then, that the tract and the activities of Indians occurring thereon are subject to state and local law, unless there is express federal law to the contrary.

It is beyond dispute that § 5 of the 1934 Indian Reorganization Act (25 U.S.C. § 465)—the statutory provision pursuant to which the 76-acre tract was taken in trust—does not expressly exempt that tract from municipal land use regulation. *See Mescalero Apache Tribe* v. *Jones, supra*, 411 U.S. at 155-59. Therefore, the only express federal authority available to support the decision of the District Court upholding the policy of the Department of the Interior is 25 C.F.R. § 1.4. [10] A close examination of the applicable case law, however, plainly shows

[10] As recognized by the District Court, § 1.4 was promulgated in furtherance of the long standing policy of the Department that municipal land use laws are not applicable to Indian trust lands. App. at 22a. It has not been claimed that there is express statutory authority for § 1.4.

that § 1.4 is invalid to the extent that it applies to § 5 non-reservation trust land and, therefore, is not satisfactory authority for exempting such off-reservation trust land from municipal land use regulation in all respects.

The District Court upheld the applicability of § 1.4 to non-reservation trust land based upon the rationale of *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655, 664-68 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977). *See* App. at 23a-24a. Under the general principles regarding the applicability of state laws to Indians and their property outlined above, however, it is apparent that *Santa Rosa* is not controlling in the instant case. At issue in *Santa Rosa* was the applicability of land use regulation to trust lands located *within* a reservation. *See id.* at 657-68 & 663; *United States* v. *County of Humboldt*, 615 F.2d 1260, 1261 (9th Cir. 1980) ("Indian reservation trust lands" involved in *Santa Rosa*). *See also Crow Tribe of Indians* v. *State of Montana*, 650 F.2d 1104, 1109-10 (9th Cir. 1981), *amended* 655 F.2d 1390 (1982). It is in this context that the statements of the *Santa Rosa* Court relied upon by the District Court must be viewed. Since it has long been recognized that Indians and their property are, within a reservation, generally exempt from state law, it was logical for the *Santa Rosa* Court to conclude "that the exemption [from land use regulation] was implicit in the grant of trust lands *under existing principles.*" *Id.* at 666 n. 17 (emphasis added). However, in light of the well established principle that state laws generally apply to Indians and their property when not within an Indian reservation *unless* there is express federal law to the contrary, the same cannot fairly be concluded in regard to off-reservation trust lands, such as are involved here. [11] *See Mescalero Apache Tribe* v. *Jones*, *supra*, 411 U.S. at 150. Therefore, because off-reservation trust land is at issue, the rationale of *Santa Rosa* is plainly inapplicable here.

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[11] In this regard, the Indian Reorganization Act offers no support since that Act was not intended to expand or reduce the immunities from state law which Indians traditionally enjoyed. *See, e.g., Mescalero Apache Tribe* v. *Jones*, *supra*, 411 U.S. at 152; *Fort Mojave Tribe* v. *County of San Bernardino*, 543 F.2d 1253, 1256 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

Nor is the federal instrumentality doctrine of any avail here. The *Santa Rosa* Court referred to that doctrine (*id.* at 666) and the policy of the Department of the Interior in this regard is apparently based upon the doctrine. *See, e.g.*, 58 I.D. 52 (1942). In *Mescalero Apache Tribe* v. *Jones*, however, this Court expressly rejected the applicability of the federal instrumentality doctrine in the context of § 5 off-reservation trust lands.[12] *Id.*, 411 U.S. at 150-53. *See also Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 474 n. 13 (1976). Indeed, the United States has, in the context of a different case, recognized that "the Court is repudiating the 'federal instrumentality' doctrine as a shield against State interference . . . ." Brief for the United States as Amicus Curiae at 20, *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue of New Mexico*, Sup. Ct. No. 80-2162. It is thus apparent that the decision of the District Court cannot be sustained on the basis of the federal instrumentality doctrine. In conclusion then, 25 C.F.R. § 1.4 is invalid in regard to § 5 off-reservation trust lands and, therefore, the decision of the District Court, as affirmed by the Court of Appeals, that the land use regulations of the City are unenforceable in their entirety on the 76-acre tract is plainly in error.

3. Judicial review of the decision to accept the 76-acre tract in trust—scope of Sections 5 & 19.

The Court of Appeals affirmed the ruling of the District Court that the 76-acre tract was properly accepted in trust under the 1934 Indian Reorganization Act (App. at 12a-16a), even though the Department of the Interior did not properly construe the scope of tribal eligibility under § 19 of the Act (25 U.S.C. § 479) and the scope of its authority to acquire lands in trust under § 5 of that Act (25 U.S.C. § 465). As indicated earlier, the 1934 Indian Reorganization Act is viewed by the

[12] Although decided in the context of state taxation, *Mescalero Apache Tribe* is directly applicable here since the federal instrumentality doctrine, in the context of land use regulation, operates no differently than it does in the context of state taxation. *Compare United States* v. *Rickert*, 188 U.S. 432, 438-39 (1903) *with* 58 I.D. 52 (1942). *See also Mescalero Apache Tribe* v. *Jones, supra* at 150 (doctrine was "in vogue in a variety of contexts").

Department of the Interior as the Act having, in the context of land acquisition, the "broadest application" (J.A. 224), and it is the only such provision of general applicability. Therefore, in view of the ever increasing amount of land being taken in trust by the Department of the Interior, and in view of the potentially serious effect such acquisitions may have upon the revenue generating abilities and jurisdictional authority of the local governmental subdivisions where these lands are acquired, it is important that this Court definitively establish the precise scope of the 1934 Indian Reorganization Act in this context. And, under the applicable standards for judicial review, the Court will unquestionably have the opportunity to fully examine and define the scope of §§ 5 and 19.

This case, to the extent that the validity of the acquisition in trust is involved, is clearly one for judicial review of administrative action, and the District Court so recognized. App. at 11a, 31a. In such an action, this Court has mandated that the reviewing court conduct a "substantial inquiry" beginning with the question of whether the governmental agency involved acted within the scope of its authority. *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415 (1971). In order to determine whether the particular agency involved has acted within its authority, it is established that the reviewing court must first delineate the scope of the agency's authority and discretion under the applicable statute. *Overton Park, supra*, 401 U.S. at 415-16. It must then decide whether, based upon the administrative record (*see, e.g., Camp* v. *Pitts*, 411 U.S. 138, 141-42 (1973)), the agency properly construed the scope of its authority under the applicable statute. *Overton Park, supra*, 401 U.S. at 416. *See, e.g., Securities and Exchange Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 87 & 94 (1943). Following this approach in the instant case, the decision of the District Court, as affirmed by the Court of Appeals, that the tract was properly accepted in trust under §§ 5 and 19 does not withstand analysis.

Section 5:

In enacting the 1934 Indian Reorganization Act, one of the primary concerns of Congress was the significant erosion of the Indian land base which had occurred as a result mostly of the allotment policy established in the 1880's. *See, e.g.*, 78 Cong. Rec. 11727-28 (1934) (remarks of Rep. Howard). In this regard then, the primary thrust of the Act was logically to prevent further erosion of the Indian estate. *See, e.g.*, H.R. Rep. No. 1804, 73d Cong., 2d Sess. at 1, 7 (1934); 78 Cong. Rec. 11727-30 (remarks of Rep. Howard). However, the legislative history to this Act clearly shows that § 5 was not adopted by Congress for this particular purpose, but was instead adopted for a corollary, but plainly different purpose: To restore some of the lost land. *See, e.g.*, 78 Cong. Rec. 11727 and 11730 (remarks of Rep. Howard). And, although intended to restore some of the lost lands, it is evident that Congress did not intend § 5 to be an open ended acquisition provision. On the contrary, the pertinent legislative history shows that Congress enacted § 5 for a very distinct and limited purpose: As succinctly stated by one of the Act's primary sponsors, Representative Howard, § 5 was intended to establish "a land acquisition program to provide land for Indians who have no land or insufficient land, and who can use land beneficially . . . " (78 Cong. Rec. 11730)—in other words, to provide lands for only those Indians and tribes who are in need of such. *See, e.g.*, H.R. Rep. No. 1804, 73d Cong., 2d Sess. at 6, 7(1934); S. Rep. No. 1080, 73d Cong., 2d Sess. at 1, 2 (1934); 78 Cong. Rec. 11123 (remarks of Senator Wheeler—Senate sponsor), 11727 (remarks of Rep. Howard). For example, it was stated in H.R. Rep. No. 1804, *supra*

> *Section 5 authorizes the Secretary of the Interior to purchase or otherwise acquire land for landless Indians.*
>
> The title to land thus acquired will remain in the United States. *The Secretary may permit the use and occupancy of this newly acquired land by landless Indians;* he may loan them the money for improvements and cultivation but the continued occupancy of

> this land will depend on its beneficial use by the Indian occupant and his heirs.

Id. at 7 (emphasis added). And in S. Rep. No. 1080, *supra*, it was stated:

> To meet the needs of landless Indians and of Indian individuals and tribes whose land holdings are insufficient for self-support, section 5 of the bill authorizes the purchase of lands by the Secretary of the Interior . . . .

Id. at 2. The pertinent aspects of the floor debates cited above are to the same effect.

In addition, the contemporaneous administrative interpretation—a matter entitled to substantial weight (*see, e.g., Udall* v. *Tallman*, 380 U.S. 1, 16 (1964))—is strongly supportive of this interpretation. *See, e.g.*, [1934] Report of the Commissioner of Indian Affairs at 79-80; [1935] Report of the Commissioner of Indian Affairs at 114; [1936] Report of the Commissioner of Indian Affairs at 160; [1939] Report of the Commissioner of Indian Affairs at 31-32; J.A. at 186 (Circular of the Commissioner of Indian Affairs), 191 (Memorandum of the Solicitor), 192 (Memorandum of the Solicitor), 198 (Memorandum of Felix Cohen for the Solicitor), and 200 (Memorandum of the Acting Solicitor). For example, in the contemporaneous Annual Reports of the Commissioner of Indian Affairs, it was consistently stated that § 5 authorized annual appropriations "for the purchase of land for landless Indians." 1934 Annual Report, *supra* at 114; 1935 Annual Report, *supra* at 79; 1936 Annual Report, *supra* at 160. *See also* 1939 Annual Report, *supra* at 31-32. The other Department of the Interior materials cited above are of similar import. For example, in a Memorandum of the Solicitor of the Department of the Interior, dated February 3, 1937 (J.A. 192), it was stated that

> [Section 5] authorized a land acquisition program for the benefit of Indians. . . . The stated purpose of the section is to provide land for Indians, and there should be a showing that the Indian or tribe for whom the land is being acquired *is in need of same.*

Id. (emphasis added).

The preceding discussion establishes that the essential purpose of § 5 was to authorize the Secretary of the Interior to acquire lands for tribes and Indians who have no land or insufficient land and who could use the land beneficially. *See also Hydaburg Cooperative Assoc.* v. *United States*, 667 F.2d 64, 67-68 (Ct.Cl. 1981); Cohen, *supra* at 614. Logically then, only in those situations where these requirements are met does the Secretary have the authority to acquire lands under this provision.[13] Thus, the determination of eligibility under § 5 must necessarily focus on the needs and landholding of the tribal or individual applicant. In practice, however, this standard has not been employed by the Bureau of Indian Affairs in recent years. Instead, in deciding whether a proposed acquisition was proper under § 5 at the time the 76-acre tract was accepted in trust, the Bureau's policy was to refuse to accept title to lands in trust outside an existing Indian reservation except in "unusual circumstances" (App. 231). It is evident then, that the acquisition at issue was approved on the basis of an "unusual circumstances" standard, and not the standard of need and landholdings required for a § 5 acquisition. Therefore, the Bureau clearly failed to apply the proper standard for determining whether the proposed trust acquisition was proper under that section, thereby rendering the acquisition of the 76-acre tract in trust invalid.

Moreover, because the Tribe already owned the tract when it was accepted in trust (J.A. 231, 237 & App. at 16a), the acquisition was not authorized under § 5 for the additional reason that § 5 was not intended to authorize the Secretary of the Interior to accept lands in trust where the proposed

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[13] The two lower court decisions in which the scope of § 5 was directly at issue—*Chase* v. *McMasters*, 573 F.2d 1011, 1015-16 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978) and *City of Tacoma* v. *Andrus*, 457 F. Supp. 342, 345-46 (D.D.C. 1978)—indicate that § 5 was not so limited. *But see Hydaburg Cooperative Assoc.* v. *United States*, *supra*, 667 F.2d at 67-68. However, in neither of these decisions is the legislative history and subsequent administrative treatment given full consideration. And, as this Court has often counselled, reliance on "isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards. . . ." *New England Power Co.* v. *New Hampshire*, ____ U.S. ____, 50 U.S.L.W. 4223, 4226 (February 24, 1982).

benficiary already owns the land.[14] Section 5 expressly authorizes the Secretary of the Interior to "acquire . . . any interest in lands . . . for the purpose of providing land for Indians. . . ." In explicitly so providing, it is unlikely that Congress intended to authorize the Secretary to accept title to lands in trust where the grantor is also to be the trust beneficiary. That is, where the proposed beneficiary owns the land, in no sense of the word can it be said that the Secretary is "providing" lands for that proposed beneficiary. That § 5 was not intended to authorize trust acquisitions where the proposed beneficiary already owns the land, is confirmed by the fact that the very purpose of this provision is to provide land to Indians and tribes who have no land or insufficient land for self-support. The clear implication is that § 5 was intended to authorize the acquisition in trust of *additional* lands for those qualified in order to provide a means of self-support. *See also* Cohen, *supra* at 483.

This interpretation is further supported by the subsequent administrative treatment as the Department of the Interior and its officials have—until the middle 1970's—consistently taken the official position that § 5 did not authorize fee to trust acquisitions where the proposed beneficiary already owned the land involved. *See, e.g.*, J.A. at 181 (Memorandum of the Solicitor), 183 (Memorandum of the Solicitor), 201 (Memorandum of the Assistant Solicitor), 205 (Letter of the Director, Office of Trust Responsibilities), 206 (Letter of the Commissioner of Indian Affairs), and 209 (Letter of the Commissioner of Indian Affairs). For example, in a Memorandum dated April 4, 1935 (J.A. 183), the Solicitor stated as follows:

> As suggested in my earlier memorandum [J.A. 181], I doubt that it can be fairly said that we are "providing land for Indians", within the meaning of Section 5 of the Act of June 18, 1934, when we take legal title to Indian owned land and issue to the original Indian owner a restricted title to the same land.

Id. The other memoranda cited above are to the same effect.

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[14] In both *Chase* and *City of Tacoma*, acquisitions of this sort were upheld. However, as was the situation in regard to the scope of § 5 generally (*see* n. 13, *supra*), neither decision gave full consideration to the applicable legislative history and subsequent administrative treatment.

Section 19:

In the District Court, it was basically conceded that "tribe" for the purposes of § 19 of the Indian Reorganization Act, 25 U.S.C. § 479, included only those tribes and bands federally recognized when the Act was passed in 1934 and the Indians residing on one reservation. App. at 13a and n.6. This interpretation is based upon the legislative histories to the Act and later amendments, as well as the pertinent administrative, legislative, and judicial treatment of that Act. *See, e.g.*, Addendum F to the Opening Brief for Appellant City of Sault St. Marie. *See also Morton* v. *Mancari*, 417 U.S. 535, 542 (1974); *United States* v. *State Tax Comm'n of the State of Mississippi*, 505 F.2d 633, 642 (5th Cir. 1974), *reh. denied*, 535 F.2d 300 (1976); *United States* v. *State Tax Comm'n of the State of Mississippi*, 535 F.2d 300 (5th Cir.), *denying rehearing to* 505 F.2d 633 (1974). In this case, the decision to treat the Tribe as eligible for the benefits of the Indian Reorganization Act was apparently made some five years prior to the trust acquisition at issue in a Memorandum of the Commissioner of Indian Affairs, dated September 7, 1972 (J.A. 105-06). *See* App. at 13a; J.A. at 229. A review of this Memorandum, and the record upon which that decision is based (J.A. 96-161), reveals there is nothing in either the Memorandum or the underlying record which shows that the decision to extend the benefits of the Indian Reorganization Act to the Tribe was governed by the standard discussed above.[15] On the contrary, references to the matter of federal recognition of the Tribe in the pertinent materials actually indicate that the focus of the 1972 Memorandum was only on whether to extend federal recognition at that time; absolutely no consideration was given to whether that group had been federally recognized in 1934. It is readily apparent then, that the Department of the Interior did not use the proper standard for determining the eligibility of the Tribe under the Indian Reorganization Act as a "tribe". Therefore, the acquisition was improper for that reason as well.

[15] The Tribe was not reservation-based at this time nor is it such now as its 40-acre reservation on Sugar Island remains uninhabited (J.A. 230).

4. Applicability of the procedural protections of the Due Process Clause to municipal corporations where no opportunity to be heard is provided.

The District Court originally held that while the City was entitled to the protections of Due Process, it was, under the circumstances, accorded the process due it. App. at 16a-20a. Subsequently, however, on the City's Motion for Reconsideration, the District Court changed its mind and held that the City was not a person within the meaning of the Fifth Amendment and that the City's taxing and regulatory powers[16] were not property interests protected by the Fifth Amendment. App. at 6a-8a. The Court of Appeals affirmed on the basis that the City was accorded the process due it without addressing the threshold question of whether the City was entitled to Due Process. App. at 4a. Thus, the District Court's holding that the City was not entitled to the protection of Due Process was not rejected and, therefore, still stands as binding precedent. The holdings of the District Court and the Court of Appeals in this context do not withstand analysis under the applicable decisions of this and other Courts.

a. Applicability of the Due Process Clause

Before it can be determined whether the process due under the Due Process Clause of the Fifth Amendment was accorded in any one case, it must first be determined whether the particular claimant is a "person" within the meaning of the Due Process Clause and whether the interest affected by the governmental action in question is a "property interest" protected by that Clause. *See, e.g., Goss* v. *Lopez,* 419 U.S. 563, 572-73 (1975); *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564 (1972).

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[16] As a result of the acquisition in trust, the 76-acre tract is expressly exempted under § 5 (25 U.S.C. § 465) from State and local real property taxation (J.A. 231). Prior to the acquisition in trust, the tract was not so exempt (J.A. 236). In addition, the federal government and the Tribe take the position that the 76-acre tract, upon attaining trust status, is exempt from the land use regulation of the State and City (J.A. 232-33).

The City as a "person":

The District Court found that because the State is not a "person" within the meaning of the Due Process Clause (*e.g., South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-24 (1966)), it logically followed that a municipal corporation[17]—as a subdivision of the State—is also not a "person" within the meaning of that provision. App. at 7a-8a. Although superficially appealing further analysis of the applicable case law compels the opposite conclusion. While it is true that it is a creature of the State (*see, e.g., City of Trenton* v. *State of New Jersey*, 262 U.S. 182, 185-90 (1923)), a municipal corporation, once established, has—like a private corporation—a life separate from the State during its existence; that is, much like a private corporation, it functions independently of the State within the strictures of applicable state law. *See generally Dooley* v. *City of Detroit*, 370 Mich. 194, 207-10, 121 N.W.2d 724, 730-33 (1963). Indeed, it is because the position of a municipal corporation under state law is analagous to that of a private corporation that the Second Circuit found that a municipal corporation is a "person" within the meaning of the Due Process Clause of the Fourteenth Amendment.[18] *Township of River Vale* v. *Town of Orangetown*, 403 F.2d 684, 686 (2d Cir. 1968). *See also City of Santa Clara, California* v. *Andrus*, 572 F.2d 660, 675 (9th Cir. 1978); *Aquayo* v. *Richardson*, 473 F.2d 1090, 1100-01 (2d Cir. 1973). That the position of a municipal corporation is more analagous to that of a private corporation in this context was recently confirmed by this Court in *Owen* v. *City of Independence, Mo.*, 445 U.S. 622 (1980), wherein it was stated that "by 1871 municipalities—*like private corporations*—were treated as *natural persons for virtually all purposes of constitutional and statutory analysis....*" *Id.* at 638-39 (emphasis added). *See also Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658, 687-88 (1978).

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[17] The City of Sault Ste. Marie is a municipality duly incorporated under the laws of the State of Michigan (J.A. 227).

[18] In this regard, it is well established that the analysis required under the Fifth and Fourteenth Amendments is virtually identical. *See, e.g., Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976); *Benton* v. *Maryland*, 395 U.S. 784, 785 (1969).

Despite the persuasiveness of the foregoing precedents and despite its own initial conclusion that the argument that municipalities are not persons for purposes of the Fifth Amendment "runs contrary to the weight of logic and clear precedent" (App. at 17a), the District Court felt compelled to follow *Katzenbach* because, in its view, "municipalities and states are treated the same for virtually all legal purposes." App. at 7a. Such, however, is not necessarily the case. Thus, while municipal corporations have historically been treated as natural persons for virtually all purposes of constitutional and statutory analysis (*see, e.g., Owen* v. *City of Independence, Mo., supra*), states have not been so treated. *See, e.g., Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 667 (1979). *See also Quern* v. *Jordan*, 440 U.S. 332 (1979). Moreover, this Court has, in a number of different contexts, treated municipal corporations differently than states.[19] *See, e.g., Mount Healthy School District Board of Education* v. *Doyle*, 429 U.S. 274, 280 (1977); *Moor* v. *County of Alameda*, 411 U.S. 693, 717-20 (1973); *Lincoln County* v. *Luning*, 133 U.S. 529, 530 (1890). *See also Community Communications Co., Inc.* v. *City of Boulder, Colorado*, ____ U.S. ____, 102 S.Ct. 835 (1982).

The powers of taxation and land use regulation as property interests:

The District Court further found that because the powers of taxation and regulation are not compensable interests for purposes of the Just Compensation Clause of the Fifth Amendment, such powers "are only an expectation" and, therefore, do not rise to the level of a " 'legitimate claim of entitlement' " which would entitle the City to the protections of Due Process. App. at 8a. This ruling misconstrues the test for determining what constitutes a property interest established in *Board of Regents of State Colleges* v. *Roth, supra*, 408 U.S. at 577. Since the power of taxation is granted to the City by the State of Michigan (J.A. 236), to be exercised annually in regard to all non-tax exempt property located within the City (*see* City

[19] A critical factor in this context is the fact that the municipal corporation was not a mere agent of the State. Such is clearly the situation in Michigan. *See, e.g., Dooley* v. *City of Detroit*, 370 Mich. 194, 207-10, 121 N.W.2d 724, 730-33 (1963).

Charter, § 9.1), and since the power to regulate is also granted to the City by the State of Michigan and is exercised on an ongoing basis (J.A. 236), the *Roth* test has, as the District Court originally ruled (App. at 17a), been plainly satisfied.[20] *See also Township of River Vale* v. *Town of Orangetown, supra* at 685 (reduction in tax revenues sufficient to invoke Due Process Clause of Fourteenth Amendment).

b. The City was not provided with a meaningful opportunity to be heard

Once it is determined that the Due Process Clause of the Fifth Amendment is applicable, it must then be determined what process is due and whether the complainant was accorded the requisite procedural protections. *See, e.g., Mathews* v. *Eldridge, supra,* 424 U.S. at 334. The District Court found that a public hearing held by the City Commission on December 1, 1976, provided all the process that was due it (App. at 22a)—a ruling which was expressly upheld by the Court of Appeals. App. at 4a. Where procedural Due Process must be accorded, a fundamental requirement is that the affected party be provided with an "opportunity to be heard '. . . *in a meaningful manner.*' "[21] *Mathews* v. *Eldridge, supra,* 424 U.S. at 333 *quoting*

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[20] As noted above, the District Court found it significant that such powers are not compensable interests for purposes of the Just Compensation Clause. To the contrary, however, compensability is neither dispositive nor necessary in this context. *See, e.g., Board of Regents of State Colleges* v. *Roth, supra,* 408 U.S. at 576-78 (public employment); *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) (welfare benefits). *See also Logan* v. *Zimmerman Brush Co.,* ____ U.S. ____, 50 U.S.L.W. 4247, 4250 (February 24, 1982).

[21] In order to determine what process is due, an analysis of the governmental and private interests affected must be made. *Mathews* v. *Eldridge,* 424 U.S. 319, 334-35 (1976). Applying the factors outlined in *Mathews* to the instant case, it is clear that Due Process requires, at minimum, an opportunity to comment on the proposed acquisition prior to final acceptance in trust. By permitting the City to comment at some stage before acceptance in trust, the risk of an erroneous taking would be significantly reduced. At the same time, the federal government would be better informed of the implications of and the needs for trust status in each particular case, thus leading to a sounder exercise of discretion under § 5 (25 U.S.C. § 465). Moreover, permitting the City to comment on a proposed trust acqusition at some time before a tract is finally accepted in trust will not be unduly burdensome. *See* 25 C.F.R. § 120a.10(e) and (f) (1981).

Armstrong v. *Manzo*, 380 U.S. 545, 552 (1965) (emphasis added). *Accord, Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972). This Court has indicated that the primary concern underlying this requirement is that

> when a person has an opportunity to speak up in his own defense, *and when the State must listen to what he has to say*, substantively unfair and simply mistaken deprivations of property interests can be prevented ....

Fuentes v. *Shevin, supra* at 81 (emphasis added). Guided by these considerations, it is readily apparent that the 1976 City Commission hearing in no way satisfied the meaningful hearing requirement.

The 1976 public hearing was called by the City Commission in order to hear the views of all affected—particularly those of the community it represents—regarding the proposed trust acquisition before it adopted a formal position on behalf of the City. *See* J.A. 775-91. The hearing was not intended to be a forum by which the Commission would express its official views; nor did the Commission, officially or otherwise, express its views as to the proposed trust acquisition at that hearing. *See id. See also* J.A. 478. Moreover, all of the participants—including representatives of the Department of the Interior—were made fully aware that the hearing was purely investigatory. *See, e.g.*, J.A. 786-88. In other words, the federal officials were there to present their views and not to hear the views of the City. It is evident then, that this hearing can hardly be considered to have provided the City with an opportunity to be heard in a meaningful manner. Therefore, since it is not claimed that the City was otherwise provided the process due it, it is readily apparent that the Department of the Interior failed to provide the City with the process due it under the circumstances.

II. THE QUESTION OF WHETHER THE 76-ACRE TRUST TRACT IS "INDIAN COUNTRY" WITHIN THE MEANING OF 18 U.S.C. § 1151, IS A RECURRING ISSUE OF IMPORTANCE.

The Court of Appeals also upheld the District Court's finding that the issue of whether the 76-acre trust tract constituted "Indian Country" within the meaning of 18 U.S.C. § 1151(b) was not ripe for decision.[22] App. at 20a-21a. The District Court found that the issue of whether the tract was a dependent Indian community within the meaning of § 1151(b) called for "an extensive factual inquiry" as to matters which could not be adequately evaluated in view of the fact that the housing project had not yet been built. App. at 21a. This finding is based upon a misapprehension which now exists in the applicable federal case law as to what is ultimately the focus in determining whether § 1151(b) is applicable. *See, e.g., United States* v. *State of South Dakota, supra,* 665 F.2d 837; *Weddell* v. *Meierhenry,* 636 F.2d 211, 212-13 (8th Cir. 1980), *cert. denied,* 451 U.S. 941 (1981); *United States* v. *Martine,* 442 F.2d 1022 (10th Cir. 1971); *United States* v. *Oceanside Oklahoma, Inc.,* 527 F. Supp. 68 (W.D. Okla. 1981); *United States* v. *State of South Dakota,* 7 ILR 3148 (D.S.D. Sept. 8, 1980), *aff'd,* 665 F.2d 837 (8th Cir. 1981), *petition for cert. filed,* No. 81-1910 (March 8, 1982); *United States* v. *Mound,* 477 F. Supp. 156 (D.S.D. 1979); *Youngbear* v. *Brewer,* 415 F. Supp. 807, 809 (N.D. Iowa 1976), *aff'd,* 549 F.2d 74 (8th Cir. 1977). *See also* 88 I.D. 333, 334 (1981). What these cases fail to adequately recognize is that congressional intent ultimately controls in this context. That is, while the factors outlined in these cases can, where congressional intent is unclear, be an aid in divining this intent, they are plainly not the sole means by

[22] In the District Court, the Respondents conceded that the tract was not an allotment within the meaning of § 1151(c) and was not a reservation for purposes of § 1151(a). *See, e.g.,* J.A. 237, 730. Also, the Respondents have not claimed that the tract would be "Indian Country" in the event the tract is not properly held in trust.

which dependent Indian community status is to be ascertained.[23] In view of the apparent confusion and conflict in the case law and in view of the fact that this question is one of growing importance and hence continuing concern, guidance is needed from this Court as to the significance of congressional involvement in this context. Indeed, until this Court definitively settles this issue, it is likely that the recent increase in litigation of the issue will continue. In addition, because the ultimate resolution of the applicability of § 1151(b) in this case involves consideration of the 1934 Indian Reorganization Act—an Act of unquestionably broad applicability—the Court will also be able to provide guidance as to the significance of § 5 acquisitions in the context of criminal jurisdiction.

The term "dependent Indian communities" as employed in § 1151(b), was first codified in the 1948 revision of Title 18 [24] (*see* Reviser's Notes), and was included as part of the statutory definition based on the cases of *United States* v. *McGowan*, 302 U.S. 535 (1937) and *United States* v. *Sandoval*, 231 U.S. 28 (1913). *See, e.g.*, Reviser's Notes, 18 U.S.C. § 1151; *Weddell* v. *Meierhenry, supra*, 636 F.2d at 212; *United States* v. *Martine, supra*, 442 F.2d at 1023; *United States* v. *Mound, supra*, 477 F. Supp. at 157-58; *Cohen, supra* at 38. Because the term "dependent Indian communities" is derived from and based upon those two cases, it logically follows that the intended scope of § 1151(b) can be determined only with reference to them.

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[23] Moreover, there is presently a direct conflict in the pertinent state case law as to the significance of congressional intent. *Compare C.M.G., A Juvenile* v. *Oklahoma*, 594 P.2d 798, 802-04 (Okla. Ct. Crim. App.), *cert. denied*, 444 U.S. 992 (1979) *with State* v. *Dana*, 404 A.2d 551, 557-58 (Me. 1979), *cert. denied*, 444 U.S. 1098 (1980).

[24] The basic purpose of the 1948 revision was to codify existing case law on the subject since there was no statutory definition in use at the time. *See, e.g.*, Reviser's Notes, 18 U.S.C. § 1151; *United States* v. *John*, 437 U.S. 634, 648, 649 n.18 (1978); *C.M.G., A. Juvenile* v. *Oklahoma, supra*, 594 P.2d at 801. *See also Williams* v. *United States*, 215 F.2d 1, 3 (9th Cir. 1954). As stated in the Reviser's Notes, the "[d]efinition is based on latest construction of the term by the United States Supreme Court. . . ."

The thrust of the Court's opinion in both *McGowan* and *Sandoval*, was that the determination of the status of land—for the purposes of federal jurisdiction—is a question that only Congress can resolve.[25] *United States* v. *McGowan*, *supra* at 538-39; *United States* v. *Sandoval*, *supra* at 46. As this Court stated in *Sandoval*,

> in respect of distinctly Indian communities the question whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States *are to be determined by Congress*. . . .

Id., 231 U.S. at 46 (emphasis added). *Accord United States* v. *McGowan*, *supra*, 302 U.S. at 538-39. It follows then, that the key inquiry is whether Congress has manifested an intent—implicitly or explicitly—to have the particular community in question recognized and dealt with as a dependent Indian community requiring the special guardianship and protection of the United States. Not only does this analysis find support in the governing case law, but it would prove to be a wiser and more workable approach than that which now prevails, since the former is not susceptible of fluctuation (except with further congressional involvement), while the latter can easily produce

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[25] A close examination of both cases reveals that the Court was dealing essentially with land and groups of Indians which closely approached enjoyment of reservation status. Therefore, it logically follows that in both cases the Court must have been implicitly guided by a desire to include under the definition of "Indian Country" those lands which were, in effect, *de facto* reservations, even though such land may never have been explicitly designated as such. It is reasonable to conclude then, that the term "dependent Indian communities", as used in *McGowan* and *Sandoval*, and later incorporated into § 1151, was primarily intended as a catch-all phrase to promote uniform application of federal laws, not on "reservations" alone, but also on Indian lands which—as a result of congressional involvement—in fact shared all the important characteristics of Indian reservations. In this regard, it is worth mentioning that there are a number of areas of exclusive Indian occupancy established by Congress which are not labelled reservations (*e.g.*, rancherias, colonies, and communities). *See, e.g.*, U.S. Department of Commerce, *Federal and State Indian Reservations* (1974); 1980 *Annual Report of Indian Lands*, *supra* at 4-42.

different results in different years with changes in federal programs and community makeup. *Cf. United States* v. *State of South Dakota, supra,* 665 F.2d at 842; *Weddell v. Meierhenry, supra,* 636 F.2d at 213; *United States* v. *Oceanside Oklahoma, Inc., supra,* 527 F. Supp. at 69-70; *United States* v. *State of South Dakota, supra,* 7 ILR at 3148; *United States* v. *Mound, supra,* 477 F. Supp. at 160. To be sure, in certain instances an extensive factual inquiry will still be needed to interpret ambiguous congressional action. In this case, however, such is not needed since it is already evident from the record that the requisite congressional intent to establish a community under the special jurisdiction and control of the federal government is not present.

An examination of congressional involvement in the instant case reveals, first of all, that there is no evidence of congressional action directed toward the Tribe that might indicate an intent to protect "a dependent people" on the 76-acre tract. Indeed, no congressional action relating specifically to the Tribe was taken either before or after recognition was extended by the Department of the Interior in 1972.[26] The present case, therefore, reflects a total absence of any affirmative congressional "assertion of guardianship" (*United States* v. *Sandoval, supra* at 47), required to support a finding of federal criminal jurisdiction.

Nor can it be said that § 5 of the 1934 Indian Reorganization Act (25 U.S.C. § 465)—the section pursuant to which the tract was acquired in trust—provides the requisite congressional involvement. An examination of that Act demonstrates that Congress in no way contemplated that acquisition of lands located outside an existing reservation area under § 5 would, without more, result in pervasive federal jurisdiction on the lands. *See* H.R. Rep. No. 1804, 73d Cong., 2d Sess. at 7

[26] Construction of the proposed housing project on the 76-acre tract is being funded by the U.S. Department of Housing and Urban Development through the Tribe's Indian Housing Authority (J.A. 232). However, that funding is not limited to Indian tribal projects, nor is it contingent on the selected tract being held in trust or being located within an area of exclusive federal and tribal jurisdiction (J.A. 232). *See* 24 C.F.R. Part 805. Therefore, the participation by the Department of Housing and Urban Development is not a significant link in the federal-tribal relationship.

(1934); *Mescalero Apache Tribe* v. *Jones, supra,* 411 U.S. at 147-50 (§ 5 off-reservation trust land not accorded the special jurisdictional status Indian reservation lands would be accorded). The legislative history to the 1934 Indian Reorganization Act indicates that the primary purpose of § 5 was to encourage economic self-sufficiency among dispossessed Indians through its land-grant provisions. *See, e.g.,* 78 Cong. Rec. 11123 (remarks of Senator Wheeler), 11730 (remarks of Rep. Howard) (1934). There is simply no indication that Congress contemplated that any comprehensive jurisdictional consequences would automatically follow for those lands acquired off-reservation. *See Mescalero Apache Tribe* v. *Jones, supra,* 411 U.S. at 152-53 and n.9. Indeed, if such was intended, there would have been no need for Congress to enact § 7 (25 U.S.C. § 467), which expressly authorizes the Secretary of the Interior to proclaim lands acquired pursuant to the Act as new reservations or as additions to existing reservations. That Congress did not intend that off-reservation lands acquired under § 5 were to automatically result in pervasive federal jurisdiction is confirmed by the House Committee Report to the 1934 Act (H.R. Rep. No. 1804, *supra*), wherein it is stated that "[s]ection 7 gives the Secretary authority to add *newly acquired land* to existing reservations and *extends Federal jurisdiction over such lands.*" Id. at 7 (emphasis added). *See also* S. Rep. No. 1080, 73d Cong., 2d Sess. at 2 (1934); 78 Cong. Rec. 11730 (remarks of Rep. Howard) (1934).

In the Court of Appeals, the Respondents asserted for the first time in this case that the 76-acre tract is, based upon *United States* v. *John,* 437 U.S. 534 (1978) and *Cheyenne-Arapaho Tribes of Oklahoma* v. *State of Oklahoma,* 618 F.2d 665 (10th Cir. 1980), presently an Indian reservation.[27] This claim drastically changes the complexion of the criminal jurisdiction issue since the jurisdictional implications of this argument reach far beyond the question of criminal jurisdiction and involve areas not previously implicated by that issue. *See, e.g., Montana* v. *United States,* 450 U.S. 544, 565-66 (1981); *White Mountain*

[27] This claim is increasingly being made in other cases where tribal trust land is the focal point of the jurisdictional dispute. *See,* e.g., *United States* v. *State of South Dakota, supra,* 665 F.2d at 841 n.9. *See also* Wisc. OAG 24-82 at 6-7 (March 10, 1982).

Apache Tribe v. *Bracker,* 448 U.S. 136 (1980); *Washington* v. *Confederated Tribes of the Colville Indian Reservations,* 447 U.S. 134, 152-54 (1980); *Mescalero Apache Tribe* v. *Jones, supra,* 411 U.S. at 148; *Warren Trading Post Co.* v. *Arizona State Tax Commission,* 380 U.S. 685 (1965). In determining whether off-reservation lands acquired in trust pursuant to § 5 of the 1934 Indian Reorganization Act automatically assume reservation status, the focal point must necessarily be congressional intent, for it is only pursuant to congressional authority—directly or indirectly—that a reservation can be established in the first place. *See, e.g., United States* v. *Celestine,* 215 U.S. 278, 285 (1909); *Minnesota* v. *Hitchcock,* 185 U.S. 373, 390 (1902), *quoting Spalding* v. *Chandler,* 160 U.S. 394, 403-04 (1896). *See also United States* v. *Pelican,* 232 U.S. 442, 445 (1914); *Donnelly* v. *United States,* 228 U.S. 243, 255-59 (1913). The cases relied upon by the Respondents in this context do not run contrariwise. *See United States* v. *John, supra,* 437 U.S. at 648-49; *Cheyenne-Arapaho Tribes of Oklahoma, supra,* 618 F.2d at 667-68. It is evident then, that in order to determine whether off-reservation land acquired pursuant to § 5 was intended by Congress to automatically assume reservation status, the focal point is the Indian Reorganization Act itself and its accompanying legislative history. And, as the previous discussion reveals, such an examination demonstrates that Congress did not contemplate that the acquisition of off-reservation lands in trust would, without more, result in pervasive federal jurisdiction over those lands.[28] *See also* Cohen, *supra* at 45 n. 158. It is thus apparent that the significance of the 1934 Indian Reorganization Act in this context would be effectively answered by this Court's resolution of the dependent Indian community issue and, therefore, would not require the examination of matters not previously involved.

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[28] Indeed, the Respondents' contention to the contrary would appear to conflict with this Court's ruling in *Mescalero Apache Tribe* v. *Jones, supra. See* Cohen, *supra* at 45 n.158

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated this 12th day of May, 1982

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981
Civil Action No. 77-01388

No. 81-1189

CITY OF SAULT STE. MARIE, MICHIGAN
a municipal Corporation,
Appellant

v.

JAMES G. WATT, Secretary,
United States Department of the Interior, *et al.*
ARGUED 11-16-81

Before: WRIGHT, *Circuit Judge;* MCGOWAN, *Senior Circuit Judge* and WILKEY, *Circuit Judge*

O R D E R

On consideration of appellant's petition for rehearing, filed December 28, 1981, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

For The Court:

GEORGE A. FISHER,
Clerk

BY: ROBERT A. BONNER

Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981
Civil Action No. 77-01388

No. 81-1189

CITY OF SAULT STE. MARIE,
MICHIGAN, a Municipal Corporation,
Appellant

v.

JAMES G. WATT, Secretary
United States Department of the Interior, *et al.*

ARGUED 11-16-81

BEFORE: ROBINSON, *Chief Judge*, WRIGHT, TAMM, MACKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS and GINSBURG, *Circuit Judges*

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER,
Clerk

By: ROBERT A. BONNER

Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981
Civil Action No. 77-01388

No. 81-1189

CITY OF SAULT STE. MARIE, MICHIGAN,
a Municipal Corporation,
Appellant

v.

JAMES G. WATT, Secretary, United States
Department of the Interior, *et al.*

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, *Circuit Judge,* MCGOWAN, *Senior Circuit Judge,* and WILKEY, *Circuit Judge.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by counsel. The issues presented have been accorded full consideration by the court; they occasion no need for an opinion, *See* Local Rule 13(c).

This court is in agreement with the result reached by the

District Court in this case, generally* for the reasons stated in the District Court's memorandum opinion filed August 29, 1980. *See* Joint Appendix at 748-763.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam

For the Court

GEORGE A. FISHER

Clerk

* With respect to the question whether the City as such was constitutionally entitled to due process, we find that the City received all the process it was due, however the question is answered.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-1388

CITY OF SAULT STE. MARIE, MICHIGAN, *et al.*,
Plaintiffs,

v.

CECIL ANDRUS, Secretary,
Department of Interior, *et al.*,
Defendants.

ORDER

Upon consideration of plaintiff's motion to reconsider the court's ruling on the issues of procedural process, the court will modify its opinion of August 29, 1980, to reflect that plaintiff is not a person within the meaning of the Fifth Amendment and that plaintiff's tax and regulatory powers are not property interests protected by the Fifth Amendment and it is so ORDERED.

In all other respects, the opinion is REAFFIRMED and Plaintiff's motion to reconsider is hereby DENIED.

THOMAS A. FLANNERY
United States District Judge

DATED: 12-12-80

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-1388

CITY OF SAULT STE. MARIE, MICHIGAN, *et al.*,
Plaintiffs,

v.

CECIL ANDRUS, Secretary,
Department of Interior, *et al.*,
Defendants.

MEMORANDUM OPINION

This matter comes before the court on plaintiff's motion for summary judgment. Plaintiff asks the court to reconsider its ruling on the issues of procedural due process. *See* Memorandum Opinion filed August 29, 1980 at 7-12. For the reasons stated below, the court's previous opinion is modified to state that plaintiff is not a person within the meaning of the Fifth Amendment and that plaintiff's tax and regulatory powers are not property interests protected by the Fifth Amendment.

This court's August 29, 1980 opinion reasons that the plaintiff was entitled to due process because it is a person within the meaning of the Fifth Amendment. Two cases are cited in support of that proposition. Principal reliance is placed on *City of Santa Clara v. Andrus*, 572 F.2d 660, 675 (9th Cir. 1978). In that case appellant argued that a city is not a "person" entitled to due process protection under the Fifth Amendment. The court said it was "by no means convinced that [appellant's] argument is correct," but it did not decide the issue, it only assumed it for purpose of the argument before it.

The second case this court relied upon is *Township of Rivervale v. Township of Orangetown*, 403 F.2d 684, 686 (2d Cir. 1968). That case held a municipal corporation is a person within the meaning of the Fourteenth, not the Fifth Amendment. Moreover, that aspect of the case may be overruled by a later Second Circuit case, *Aguayo v. Richardson*, 473 F.2d 1090, 1100-1101 (1973).

In *South Carolina v. Katzenbach*, 383 U.S. 301, 323-4 (1966), the Court said:

> Some of these contentions may be dismissed at the outset. The word "person" in the context of the Due Process Clause of the Fifth Amendment cannot by any reasonable mode of interpretation, be expanded to encompass the *States* of the Union, and to our knowledge this has never been done by any court. (emphasis added.)

It is well settled that a municipality is a creature of the state, created by the state legislature for the exercise of such powers as the state sees fit, *e.g., City of Trenton v. State of New Jersey*, 262 U.S. 182, 185-90 (1923), and plaintiff concedes as much. *See also Tally v. City of Detroit*, 54 Mich. App. 328, 220 N.W. 2d 778 (1974) (municipality is an arm of the state under Michigan law). It is difficult to imagine how a municipality can be a "person" under the Fifth Amendment if its progenitor, the state, cannot be. Plaintiff argues that a municipal corporation has, like a private corporation, a life independent from the state during its existence. It points out that the similarity between municipal corporations and private corporations was recently noted by the Supreme Court when it stated, "by 1871 municipalities—like private corporations—were treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Owen v. City of Independence*, 100 S.Ct. 1398, 1409 (1980). However, it is equally true that municipalities and states are treated the same for virtually all legal purposes. Although both private and municipal corporations are "persons" for most purposes, the distinction between the two is that a municipality operates as an agent or subdivision of the state, while a private corporation functions totally apart from the

state. Thus a state cannot confer a constitutional status upon a municipality which the state does not itself enjoy, since the municipality performs the same function as the state.

Judge Friendly urged the same result in his opinion in *Aguayo v. Richardson,* 473 F.2d 1090, 1101 (1973). Although stating that a city might be a "person" under the Fifth Amendment for purposes of a claim of discriminatory treatment, he said "a city would clearly lack standing to raise due process claims (e.g. lack of fair hearing) relating to its citizens." There is no practical difference between saying a party is not entitled to the protection of due process and that the party has no standing to assert due process claims, and Judge Friendly's opinion affirms the district court holding that the City of New York lacked standing to assert constitutional claims against federal defendants. Accordingly, plaintiff in this case cannot assert due process claims on the basis that a city is a person within the meaning of the Fifth Amendment.

In addition, plaintiff's taxation and regulatory powers are not compensable property rights, but are only an expectation. *United States v. 6.321 Acres of Land,* 479 F.2d 404, 406. A mere expectation does not rise to the level of a "legitimate claim of entitlement," *Board of Regents v. Roth,* 408 U.S. 564, 571 (1972), which would entitle plaintiff to Fifth Amendment protection.

An appropriate Order accompanies this opinion.

THOMAS A. FLANNERY

United States District Judge

DATED: 12-12-80

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-1388

CITY OF SAULT STE. MARIE, MICHIGAN,
Plaintiff,

v.

CECIL D. ANDRUS,
Defendant.

JUDGMENT

For the reasons set forth in the accompanying Memorandum Opinion, the court having considered all the arguments put forth by the parties in their briefs and at the hearing, it is, by the court, this 29th day of August, 1980,

ORDERED, ADJUDGED and DECREED that the plaintiff's motion for summary judgment should be, and the same hereby is, denied; and it is further

ORDERED, ADJUDGED and DECREED that the defendants' motion for summary judgment should be, and the same hereby is, granted with respect to the issues of the taking of the 76-acre parcel in trust and the applicability *vel non* of the plaintiff's regulatory jurisdiction over the 76-acre parcel; and it is further

ORDERED, ADJUDGED and DECREED that the defendant's motion for summary judgment should be, and the same hereby is, denied with respect to the issue of the applicability *vel non* of

the plaintiff's criminal jurisdiction over the 76-acre parcel; and it is further

ORDER, ADJUDGED and DECREED that the issue of the applicability *vel non* of the plaintiff's criminal jurisdiction over the 76-acre parcel is dismissed because it is not yet ripe for decision.

THOMAS A. FLANNERY

United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-1388

CITY OF SAULT STE. MARIE, MICHIGAN,
Plaintiff,

v.

CECIL D. ANDRUS, *et al.*,
Defendants.

MEMORANDUM OPINION

This case calls for review of action taken by the Secretary of Interior (Secretary) under the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461-486. Section 5 of the IRA, 25 U.S.C. § 465, authorizes the Secretary to acquire lands and hold them in trust for American Indians.[1] That same section provides that such lands are exempt from local taxation,[2] and Chapter 53 of Title 18, United States Code, provides for federal criminal jurisdiction over such lands.[3] In the case at hand, the plaintiff municipality in the state of Michigan seeks review of the Secretary's decision in March, 1977, to exercise his power under the IRA to accept a 76-acre tract within the plaintiff's boundaries. The Secretary is presently holding the land in trust for the intervening defendant, the Chippewa Indians of Sault Ste. Marie (Tribe), and the Tribe plans to construct a 65-unit

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[1] 25 U.S.C. §465: "The Secretary of the Interior is hereby authorized, in his discretion, to acquire . . . any interest in lands, water rights, or surface rights to lands, within or without existing reservations . . . for the purpose of providing land for Indians."

[2] 25 U.S.C. §465: "Title to any lands or rights acquired . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

[3] 18 U.S.C. §§ 1151-1165. *See* pp. 12-13, *infra.*

federal housing project thereon.[4] Apparently the plaintiff's main concern is that this decision by the Secretary will result in a loss of criminal and civil jurisdiction over the land, although tax revenues will also be affected.[5]

This case presents two basic issues: (1) whether the land was properly taken in trust, and (2) if so, whether the plaintiff nevertheless retains criminal and regulatory jurisdiction over the land. Both sides have moved for summary judgment on all issues. For the reasons below, the court is persuaded that the land was properly taken in trust, that the issue of criminal jurisdiction is not ripe for decision, and that the plaintiff may not exercise regulatory jurisdiction over the land.

Discussion

The plaintiff makes four basic arguments:

I. The Tribe was not officially "recognized" as such in 1934, the year of the passage of the IRA, and therefore does not qualify as a "tribe" for which land could be taken in trust under the IRA.

II. The drafters of the IRA intended that land should be taken in trust only for absolutely "landless" Indians, and because the Tribe here was not landless, the defendants acted improperly.

III. The plaintiff received no notice or opportunity to comment on the Secretary's decision, so because the decision will deprive the plaintiff of valuable property interests, it denies the plaintiff due process of law.

IV. Even if the land was properly accepted in trust, the land is nevertheless subject to the plaintiff's criminal and regulatory jurisdiction.

I. The plaintiff contends that the Chippewas do not constitute a "tribe" within the meaning of section 19 of the

[4] The parties indicate that funding by the Department of Housing and Urban Development is not dependent on the outcome of this case, so the housing construction will proceed regardless of which side prevails.

[5] For the four years preceding the Secretary's taking of the land in trust, the plaintiff's tax yield from the tract was less than $100 each year.

IRA, 25 U.S.C. §479, which defines "tribe" as "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." Section 19 defines "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendents of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation . . . . "

Assuming, as the plaintiff argues, that in order to benefit from the IRA a tribe must have been federally "recognized" in 1934,[6] the question is whether the Chippewas were so recognized. According to the plaintiff, the first decision to accord recognition to the Chippewas as eligible for benefits under the IRA took place in a Memorandum of the Commissioner of Indian Affairs dated September 7, 1972. Conceding that the Memorandum refers to the Chippewas as an "historic band," the plaintiff argues that the absence in the Memorandum of any reference to the absolute requirement of federal recognition in 1934 reveals that the Secretary misconstrued his authority under the IRA. The plaintiff adds that in any event the Secretary could not reasonably have determined that the Chippewas were a tribe within the meaning of the IRA. In support of this latter point it cites a second document, a 1937 Memorandum of the Acting Solicitor to the Commissioner of Indian Affairs, which indicates that the Chippewas should not be recognized for purposes of the IRA because of Chippewas were dissolved officially by a treaty of July 31, 1855, with the United States.

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[6] The defendants grant this point arguendo, Defendants' Brief 5, and nowhere attempt to refute it. Additionally, the United States Court of Appeals for the Fifth Circuit commented in *United States v. State Tax Com'n of State of Mississippi*, 505 F.2d 633, 642 (5th Cir. 1974). "The language of Section 19 positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words 'any recognized Indian tribe *now* under Federal jurisdiction' and the additional language to that effect." Also supporting this position is the language of section 478, which provides, "It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election [for purposes of establishing tribal status in order to obtain federal benefits], which election shall be held by secret ballot upon thirty days' notice." That this election was to be held only one year after the passage of the IRA suggests that the IRA was intended to benefit only those Indians federally recognized at the time of passage.

The court is persuaded that these arguments are amply met by opposing arguments of the defendants. First, although the question of whether some groups qualified as Indian tribes for purposes of IRA benefits might have been unclear in 1934, that fact does not preclude the Secretary from subsequently determining that a given tribe deserved recognition in 1934. The 1972 Memorandum constitutes just such subsequent recognition. To hold otherwise would be to bind the government by its earlier errors or omissions. Moreover, the apparent purpose of limiting IRA benefits to tribes recognized in 1934 was to prevent new groups from coming together solely to exploit the IRA, and there is no evidence or allegation that the Chippewas have engaged in such a scheme.

As for the plaintiff's argument that the 1972 Memorandum itself was clearly erroneous and that the treaty of July 31, 1855 dissolved the Tribe, it appears that what the treaty dissolved was an artificial amalgam of the Ottawas and the Chippewas, not the Chippewas themselves. *United States v. State of Michigan*, 471 F. Supp. 192, 264 (W.D. Mich. 1979), remanded to consider the preemptive effects of subsequently passed federal regulations, No. 79-1414 (6th Cir. 1979) (per curiam). Moreover, there were two separate treaties of 1855, one of July 31 and one of August 2. *Id.* at 280. The July treaty is the one on which the plaintiff relies, yet the very existence of the later treaty indicates that the Tribe was federally recognized after the so-called dissolution treaty of July.

The defendants also cite *United States v. State of Michigan, supra*, in support of a claim of collateral estoppel on the issue of tribal recognition. Although the preceding determination removes the necessity for resolution of this argument, the likelihood of appeal renders it appropriate for the court to address the issues raised. *United States v. Michigan* involved fishing rights asserted by the Chippewas against Michigan officials, and the state argued that the Chippewas had no aboriginal fishing rights because they had voluntarily disbanded pursuant to the treaty of July, 1855. The district court ruled against the state, saying, "Ancestors and members of the plaintiff tribes have continuously exercised Indian fishing rights since the 1936 Treaty without abandonment .... [T]he Sault

Ste. Marie Tribe of Chippewa Indians are Indian tribes which are political successors in interest to the Indians who were signatory to the Treaty of March 28, 1836 . . . ." *Id.* at 249. The defendants argue that because the plaintiff in this case was in privity with the state in *United States v. Michigan*, and because the very issue of whether the Chippewas were dissolved as a tribe in 1855 was decided in the case, the plaintiff here is collaterally estopped from raising that issue again.

The court is persuaded that that case constitutes significant support for the defendants' position, but it is not determinative under the doctrine of collateral estoppel. Although the issues decided there are manifestly related to those of the present action, they are not identical so as to warrant the defendants' claim of collateral estoppel. That the Chippewas hold certain fishing rights under the 1836 treaty with the United States does not necessarily mean they constituted a federally recognized tribe within the meaning of the IRA in 1934. On the other hand, that they were found to be the tribal successors of the Indians who were signatory to the treaty does constitute strong evidence to that effect, and the court is influenced accordingly.[7]

II. The plaintiff argues that because the Chippewas were not "landless," strictly speaking, the land could not properly be taken in trust for them. Judge Gesell rejected this very argument in *City of Tacoma v. Andrus*, 457 F. Supp. 342 (D.D.C. 1978), and this court sees no sound reason to depart from this precedent. Recognizing that *City of Tacoma* is

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[7] The defendants make two additional arguments that merit only brief consideration. First, when the dispute over the trust status of the land initially arose, the United States filed suit in a United States district court in Michigan. *United States v. City of Sault Ste. Marie*, No. M-78-33 (W.D. Mich. 1978). That action was resolved by a consent decree in which the plaintiff here agreed that the Chippewas were a tribe for the purposes of certain statutes *not* including the IRA. The Secretary contends that this agreement resolves the tribal recognition issue, precluding the plaintiff from propounding its present position. This argument must be rejected. A concession with respect to issues under one statute is not a concession with respect to issues under other statutes.

The Secretary also argues that this issue is a non-justiciable political question. To the extent that the political question doctrine exists at all, *compare* Henkin, "Is There a 'Political Question' Doctrine?" 85 Yale L.J. 597 (1976), *with* L. Tribe, American Constitutional Law 71-79 (1978), this case does not fall within it. *Baker v. Carr*, 82 S.Ct. 691, 710 (1962).

virtually impossible to distinguish, the plaintiff assaults it frontally, but the passages from the legislative history and the administrative decisions quoted by the plaintiff fail to support its position.

The plaintiff makes two other related arguments, both of which are similarly unconvincing. First, it argues that the decision to acquire the land in trust erroneously turned not on a need-for-land standard but on an "unusual circumstance" standard, and under *Citizens to Preserve Overton Park v. Volpe*, 91 S.Ct. 814 (1971), this flawed procedure fatally undermines the decision. The court is persuaded that the standard as articulated reflects a broad and thoroughly acceptable mode of analysis, particularly in view of the deference due to expert agencies. *Id.* at 824. Second, the plaintiff argues that the IRA prohibits the Secretary from holding lands in trust for the persons from whom the land was acquired. Here the Chippewas bought the tract and then gave it to the Secretary. The plaintiff contends that the IRA "clearly contemplates something more than the mere transferral of interests in already-owned land from fee to trust status for the same individual or tribe." Plaintiff's Brief 36. The IRA contains no express prohibition of such a step, however, and the plaintiff's attempt to infer such a prohibition from the language of section 465 is unavailing. The procedure followed here is entirely consistent with both the letter and spirit of the statute.

III. In response to the plaintiff's due process contention, the defendants make five arguments: (1) municipalities are not persons protected by the due process clause of the fifth amendment; (2) taxation and regulatory powers are not property interests protected by due process; (3) the plaintiff received actual notice and a hearing; (4) the notice and hearing requirements for which the plaintiff argues would entail excessive fiscal and administrative burdens for the defendants; and (5) because of the binding consent decree, which precludes most possible regulatory disputes between the plaintiff and the Tribe's housing project, and because of the minimal tax dollars at stake, the plaintiff cannot be harmed by the acquisition of the land in trust; therefore no notice and hearing were required.

The first of these arguments, that municipalities are not persons within the meaning of the fifth amendment, runs contrary to the weight of logic and clear precedent. *City of Santa Clara v. Andrus,* 572 F.2d 660, 675 (9th Cir. 1978); *Township of River Vale v. Town of Orangetown,* 403 F.2d 684, 686 (2d Cir. 1968) ("We hold that a municipal corporation like any other corporation is a 'person' within the meaning of the fourteenth amendment and is entitled to its protection.").

The second argument, that municipal taxing and regulatory powers are not property interests protected by the fifth amendment, is similarly unavailing. The main authorities cited by the defendants, *Bishop v. Wood,* 96 S.Ct. 2074 (1976), and *Paul v. Davis,* 96 S.Ct. 1155 (1976), deal with unrelated aspects of the due process clause and do not support their position. Contrary to the defendants' assertions, these taxing and regulatory powers more than "resemble" traditional property rights. Indeed, they represent significant values to which the plaintiff has a "legitimate claim of entitlement," *Board of Regents v. Roth,* 92 S.Ct. 2701, 2709 (1972), and which may not be denied without due process. The defendants assert that such powers are not "compensable" and that they have no "exchange value," so they lack sufficient traditional attributes of property to support application of the due process guarantees. The error of this contention is revealed by, *inter alia,* the issuance of general revenue bonds, which involves municipal borrowing backed by the general taxing power. Such bonds reflect the economic significance of these powers, and this economic significance renders the defendants' argument meritless.

Because the plaintiff is a person within the meaning of the fifth amendment, and because the interests affected by the Secretary's action are property interests protected by the due process clause, the plaintiff was necessarily entitled to some due process of law. The remaining issue is whether the process that the plaintiff received was adequate to satisfy the fifth amendment. It is to this issue that the defendants' last three arguments pertain, and it is on this issue that the defendants prevail.

According to the plaintiff, it is "undisputed that the Federal Defendants accepted the 76-acre tract of land in trust without giving formal notice to the Plaintiff City and other interested parties, and without providing the City . . . an opportunity to comment on the acquisition of that tract in trust . . . " Plaintiff's Brief at 39. It argues that due process requires, at a minimum, (a) "appropriate notice," by which it means formal notice of the location and size of the property involved and the parties seeking to acquire the property, Plaintiff's Brief 43, 43 n. 48, and (b) an opportunity to submit written comments. The plaintiff contends that it received neither of these.

As the defendants contend in their third argument, the plaintiff received a great deal of actual notice in the form of newspaper articles, letters from interested persons, and even more direct communications with city officials. This is clear from the exhibits submitted by the defendants. The plaintiff itself states that what it failed to receive was "formal notice," and in response to the defendants' contention that the actual notice given was sufficient to satisfy the demands of due process, the plaintiff responds not with a claim of lack of actual notice but instead with a challenge to the adequacy of its opportunity to comment. Thus, the questions before the court are whether the plaintiff was entitled to formal notice rather than informal notice and whether its opportunity to comment, if any, was consistent with the demands of due process.

The Constitution itself defines what process is due when a property interest is infringed,[8] but due process is inherently flexible. *See Cafeteria & Rest. Wkrs. U., Local 473 v. McElroy*, 81 S.Ct. 1743, 1748 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 71 S.Ct. 624, 643 (1951) ("But 'due

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[8] *Arnett v. Kennedy*, 94 S.Ct. 1633, 1660 (1974) (White, J., concurring in part and dissenting in part: "While the State may define what is and what is not property, once having defined those rights the Constitution defines due process. . . ."); *id.* at 1650-51 (Powell, J., concurring: "As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.").

process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."). In the circumstances here it is clear that the fundamental fairness required by due process was satisfied by the actual notice that the plaintiff received. The extent of this actual notice was considerable, and there is no indication whatsoever that the plaintiff was prejudiced by the absence of formal notice.[9]

Moreover, and it is here that the defendants' fourth argument is germane, the court is persuaded that to require formal notice of the sort requested by the plaintiff, in addition to the informal notice actually received, would be to create an administrative obstacle that is unjustifiable at least in the case at hand. Such a requirement would be gratuitous. Where due process is at issue, the Supreme Court has mandated consideration of "the fiscal and administrative burden that the additional or substitute procedural requirement would entail," *Mathews v. Eldridge*, 96 S.Ct. 893, 903 (1976). Here such consideration weighs clearly in favor of the defendants.

The defendants' fifth argument, that "the consent decree governing the housing project eliminates all significant effects on plaintiff for the taking in trust," Defendants' Brief 35, may also be treated in this context. This court is not persuaded that the consent decree eliminates all significant effects of the Secretary's action and thereby precludes application of the due process clause. Manifestly, that agreement does not remove all disputes between the parties, who disagree on its ramifications in terms of taxes and the application of various housing regulations. To be sure, such disputes might ultimately be resolved in favor of the defendants, thereby eliminating the plaintiff's property interests, as the defendants argue. It is hardly clear at present that this will occur, however, and this court is not the proper forum in which to determine the effects of the consent decree. On the other hand, that decree does remove some of the disputes between the parties, and to that extent it lessens the plaintiff's stakes in the present action. Therefore, in view of the weighing of interests mandated by

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[9] *Cf. Nat'l Equipment Rental Ltd. v. Szukhent*, 84 S.Ct. 411 (1964) (upholding service of process, even though the service was upon a contractually designated agent unknown to the respondent, in view of the fact that the agent actually notified the respondent.)

Mathews v. Eldridge in the context of due process disputes, the consent decree does add some—but not determinative—support for the defendants' position that no more process was due.

As for the plaintiff's contention that it was denied an opportunity to be heard, the court is again persuaded that the plaintiff received all that was constitutionally required. It appears from the defendants' second exhibit, an affidavit by Joseph Lumsden, the Chairman of the Board of Directors of the Sault Ste. Marie Tribe of Chippewa Indians, that on December 1, 1976, there was a public hearing called by the Sault Ste. Marie City Commission on the subject of trust status for the very land now in dispute. Attending this hearing were all members of the City Commission; other city officials; a representative of the Bureau of Indian Affairs, which is a branch of the Department of Interior; representatives of the Tribe; and others. Approximately fifteen individuals and group representatives made presentations in support of or in opposition to the proposed action. The plaintiff's demand for more—in particular, for an opportunity to submit written comments—lacks support in precedent and manifest fairness. As above, the defendants' fourth and fifth arguments bolster this result.

IV. The court having determined that the land was properly taken in trust, there remain the two issues of whether the land is subject to the plaintiff's criminal jurisdiction and whether it is subject to the plaintiff's land use regulations.

(a) Criminal Jurisdiction. Chapter 53 of Title 18, United States Code, provides for, *inter alia,* federal criminal jurisdiction over lands that are "Indian country" within the meaning of 18 U.S.C. §1151.[10] Here the plaintiff contends that even if the land was properly taken in trust, that land does not fall within the scope of this statute. Section 1151(b), the subsection relevant to the case at hand, defines "Indian country" as "all *dependent Indian communities* within the borders of the United States . . . ." (Emphasis supplied.)

[10] This court need not address the precise extent of the criminal jurisdiction conferred by Chapter 53.

All parties agree that the term "dependent Indian community" derives from the cases of *United States v. McGowan*, 302 U.S. 535 (1937), and *United States v. Sandoval*, 231 U.S. 28 (1913). Hence, in order to determine the proper scope of section 1151(b) it is proper to turn to these cases, as explicated by two subsequent rulings, *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971), and *United States v. Mound*, 6 ILR F-159 (D.S.D. 1979).

In *United States v. Martine* the court stated,

> The Sandoval case indicates that the proper approach to [applying section 1151(b) is to consider] the nature of the area in question, the relationship of the inhabitants of the area to Indian Tribes and to the federal government, and the established practice of government agencies toward the area.

442 F.2d at 1023. The opinion in *United States v. Mound* sets forth a similar approach.[11] To say the least, analysis of these factors calls for an extensive factual inquiry, and the court is persuaded that the necessity for such an inquiry precludes summary judgment for either side at this time and under these circumstances. The Secretary emphasizes that at present the disputed parcel is uninhabited, and the planned housing project has not been built. Therefore the court cannot possibly evaluate such matters as the relationship of the inhabitants of the area with the Tribe or the type of organization that will eventually be established on the land. Clearly, this case is not ripe, and any ruling by the court would be purely advisory.

(b) Land Use Regulations. Conceding that section 465, if applicable, precludes state or local taxation of the land, Plaintiff's Brief 53, the plaintiff argues that "its powers regarding land use regulation over the 76-acre parcel have in no way been

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[11] Citing *Sandoval*, *McGowan*, and *Martine*, the court in *Mound* expressly addressed the following issues: "Title to the Land," "Purpose of the Community," "Relationship of the Community to the Tribe," "Relationship of the Community to the Federal Government," "Practice of State Government Agencies Toward the Community," and "Composition of the Community." 6 ILR F-160.

diminished by the tax exemption contained in §465." *Id.* As with the issue of criminal jurisdiction, the defendants argue that this issue is not justiciable, both because there has been no violation of or attempt to enforce any of the plaintiff's land use laws and because potential disputes along these lines were resolved by the consent degree in *United States v. City of Sault Ste. Marie.* It appears, however, that although the consent agreement resolves potential disputes with respect to some such laws, the plaintiff routinely enforces a variety of additional construction and maintenance codes that are not addressed at all in the agreement. Moreover, these laws are comprehensive in the time and geographic scope of their application, so it is implausible to say that because there has as yet been no enforcement action they are not currently in effect. Hence, there is a justiciable controversy regarding these laws.

It has long been the position of the Department of Interior that municipal land use laws may not be enforced on tribal trust lands except as permitted by the Secretary. In furtherance of this position the Secretary promulgated 25 C.F.R. §1.4, which restricts state regulatory power over all land held in trust by the federal government.[12] The plaintiff concedes that if section 1.4 is valid, it would apply to the tract in issue. Plaintiff's Brief 54.

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[12] Section 1.4 provides:

> (a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property . . . shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe . . . that is held in trust by the United States. . . .
>
> (b) The Secretary of the Interior . . . may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) . . . as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property.

The plaintiff challenges the validity of section 1.4, contending, first, that its promulgation was not authorized by any statute and, second, that it is inconsistent with the Supreme Court's ruling in *Mescalero Apache Tribe v. Jones,* 93 S.Ct. 1267 (1975). Neither argument is persuasive.

In support of the former point the plaintiff cites two professional works[13] and two district court decisions, *Norvell v. Sangre de Cristo Development Co., Inc.,* 372 F. Supp. 348 (D.N.M. 1974), *rev'd on other grounds,* 519 F.2d 370 (10th Cir. 1975); *Rincon Band of Mission Indians v. County of San Diego,* 324 F. Supp. 371 (S.D. Cal. 1971), *rev'd on other grounds,* 495 F.2d 1 (9th Cir. 1974), *cert. denied,* 95 S.Ct. 328 (1974). As the defendants point out, however, neither district court ruling survived on appeal,[14] and the arguments in those rulings and both professional works were expressly considered and rejected by the Ninth Circuit in *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655, 664-68 (9th Cir. 1975). In support of section 1.4 the *Santa Rosa Band* opinion commented, "We think 25 U.S.C. §465, which authorizes the Secretary to purchase land for the 'purpose of providing land for Indians' and to take the title to such lands in trust, when read against the history of Federal policy governing use and control of Indian trust property, is sufficient to sustain the regulation. . . ." *Id.* at 665-66.

As it must in order to prevail, the plaintiff attacks *Santa Rosa Band* directly, arguing in particular that section 465's express exemption of tribal trust land from state and local taxation yields a negative implication that no additional exemption—for example, exemption from land use regulations—was intended by Congress. This court is more per-

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[13] Price, *Law and the American Indian* (1973); Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 U.C.L.A. L. Rev. 535, 586 n.229 (1975).

[14] These cases constitute weak authority for reasons other than their failure to survive on appeal. So far as *Rincon Band* differs in its holding from *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1975), *see* text *infra,* it is clearly overruled. And *Norvell* involved state authority over non-Indian lessees of Indian-owned land.

suaded, however, by the Ninth Circuit's response to this very argument:

> Section 465 explicitly exempted the lands acquired from state taxation. Rather than reading the omission of a provision exempting the lands from state regulation as evidencing a congressional intent to allow state regulation, we read the omission as indicating that Congress simply took it for granted that the states were without such power, and that an express provision was unnecessary; i.e., that the exemption was implicit in the grant of trust lands under existing legal principles.

532 F.2d at 666 n.17.

The plaintiff also argues that the *Santa Rosa Band* court failed to consider the impact of *Mescalero Apache Tribe*, which, according to the plaintiff, fatally undermines the defendants' position. In *Mescalero Apache Tribe*, however, what the Court upheld—over challenges based on the section 465 exemption from state and local taxation—was taxation of the income of a ski resort operated on land outside the boundaries of the Indian reservation. The Court emphasized that this taxed activity took place outside the reservation and that the tax was imposed not on the land itself but on income from the land. Moreover, it upheld a section 465-based claim of immunity from the state's use tax on permanent improvements on the land.

For these reasons the court is persuaded that the plaintiff's challenge to section 1.4 must fail, and its land use regulations may not be applied to the 76-acre tract except as permitted by the Secretary.

An appropriate Judgment accompanies this Memorandum Opinion.

THOMAS A. FLANNERY

United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-1388

CITY OF SAULT STE. MARIE, MICHIGAN, *et al.*,
Plaintiffs,

v.

CECIL ANDRUS, *et al.*,
Defendants.

ORDER

This matter comes before the court on defendants' motion to dismiss. Upon consideration of this motion, the memorandum submitted in support thereof and in opposition thereto, oral argument thereon, and for the reasons stated in the memorandum filed in this case this same day, it is, by the court, this 31st day of August, 1978,

ORDERED that defendants' motion to dismiss be, and the same hereby is, granted in part and denied in part; and it is further

ORDERED that plaintiffs Maynard Adams, Hilliard Moran, and Mary Jackson be, and hereby are, dismissed for lack of standing; and it is further

ORDERED that plaintiffs' claim pursuant to the National Environmental Policy Act be, and the same hereby is, dismissed; and it is further

ORDERED that plaintiffs' claim that the Indian Reorganization Act represents an unauthorized delegation of authority from Congress be, and the same hereby is, dismissed; and it is further

ORDERED that the parties shall appear before the court for a status call on October 13, 1978 at 9:30 a.m.

THOMAS A. FLANNERY

United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-1388

CITY OF SAULT STE. MARIE, MICHIGAN, *et al.*,
Plaintiffs,

v.

CECIL ANDRUS, *et al.*,
Defendants.

MEMORANDUM

This matter comes before the court on defendants' motion to dismiss. This motion raises procedural questions in this area which appear to be matters of first impression. In this suit, plaintiffs are the City of Sault Ste. Marie, Michigan, and three individual taxpayers of that city. It appears that a group of indians claiming to be the Sault Ste. Marie tribe of Chippewa Indians has been acquiring land in the area surrounding the city and then conveying that land in trust to the United States pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §461, *et seq.* In January of 1977, the tribe acquired a 76-acre tract within the city limits, and the Bureau of Indian Affairs approved the transfer of title to these lands in trust to the United States. As a result of the taking of these lands in trust, this tract is no longer subject to city taxes or to city zoning ordinances. Plaintiffs also allege (and defendants deny) that the trust status of these lands prevents city law enforcement on this property. Plaintiffs contend that the Sault Ste. Marie tribe is not a tribe within the meaning of 25 U.S.C. 479, and that therefore, the taking of lands in trust by the United States is an abuse of discretion. Plaintiffs seek a declaratory judgment to this effect on this basis, and on the bases that (1) defendants'

methods of taking lands in trust violates due process and (2) defendants have failed to abide by the National Environmental Protection Act (NEPA) in taking this land for the construction of a large housing project without the filing of an environmental impact statement.

Defendants' motion to dismiss rests on three grounds. First, defendants claim that since this is a suit which will affect an interest in real property held by the United States, the United States is an indispensable party. However, defendants claim that since the United States' interest in this case is in Indian trust lands, the United States has not consented to be sued, *see* 28 U.S.C. § 2409a, and therefore this case must be dismissed. Second, defendants contend that the Sault Ste. Marie tribe is an indispensable party since any disposition of this case will affect their status as a tribe. However, defendants point out that this court has no personal jurisdiction over the tribe, which is located in Michigan, that the tribe is also immune from suit, and that, therefore, this case must be dismissed. Third, defendants contend that plaintiffs have failed to state a claim for which relief can be given. Specifically, defendants state that the individual taxpayers lack standing, and that the city has suffered no legal wrong since the city's ability to sell municipal bonds (the only actual damage alleged according to defendants) has not been impaired. The court will deal first with the issues of standing and certain jurisdictional problems presented by the complaint. The court will then consider defendants' arguments regarding sovereign immunity, indispensable parties, and the issues regarding plaintiffs' subsidiary claims.

I. Standing.

The issue of standing is fairly easily disposed of. In *City of Tacoma, et al. v. Andrus, et al.*, No. 77-1423 (D.D.C., Jan. 20, 1978), the court had occasion to address issues similar to those presented here. In that case the Puyallup Tribe had purchased parcels of land within the city limits of Tacoma, Washington, and the City and Port of Tacoma, four individual taxpayers of the city, two adjacent municipalities and the county containing them all brought suit. The plaintiffs in that case did not attack the validity of the designation of the Puyallups as a tribe, but

did attack the validity of taking land within municipal boundaries in trust due to the diminishment of the tax base and impairment of municipal law and zoning enforcement. The court in that case held that as to the City of Tacoma and the county, the loss of taxes and the frustration of police powers were sufficient injuries in fact to give those parties standing since these interests were indeed affected by the workings of the statute. *Id.* at 3. Similarly in the present suit, the City of Sault Ste. Marie has advanced the same types of injuries, and therefore the city must be held to have presented a claim for which relief may be granted. As for the individual taxpayers, the court in *Tacoma* indicated that their interests were not within the zone regulated by the statute, and that therefore they should be dismissed. *Id.* at 4. The individual plaintiffs in this case will suffer the same fate.

II. Subject Matter Jurisdiction.

The court notes that the complaint raises some doubts as to this court's subject matter jurisdiction over this case. The court may raise such issues *sua sponte* and act to clarify them. Plaintiff states that this court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1331, which is general federal question jurisdiction, and pursuant to section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* The Supreme Court in *Sanders v. Califano,* 97 S.Ct. 980 (1977) has held that there is no independent grant of federal jurisdiction under the Administrative Procedure Act. *Id.* at 983-85. Section 10 of the A.P.A. clearly establishes the policy that judicial review of administrative action should be widely available. *Id.* at 983. However, the Indian Reorganization Act, the statute primarily at issue in this lawsuit, contains no specific review provisions. Although the Court recognized that, in the absence of specific review provisions, it might be rational to presume jurisdiction from the Congressional statement of policy in the A.P.A., the Court rejected such reasoning in light of the recent amendment to 28 U.S.C. § 1331. In Pub. L. 94-574, 90 Stat. 2721, Congress eliminated the $10,000 jurisdictional amount requirement for suits against the United States, its agencies, and any of its officers and employees in their official capacities. The Court held that by this amendment, Congress intended that section

1331 should henceforth supply subject matter jurisdiction for federal court review of agency action. *Id.* at 985. Therefore, in the absence of review provisions in the statute at issue, the only way for plaintiff to vindicate the policy favoring judicial review expressed by Congress in section 10 of the A.P.A. is by recourse to federal question jurisdiction. The A.P.A. alone provides no independent subject matter jurisdiction.

Plaintiffs have invoked 28 U.S.C. § 1331(a) as an alternate basis for this court's jurisdiction. Section 1331(a) provides courts with general federal question jurisdiction over cases which "arise under" the Constitution, laws and treaties of the United States. Although the exact extent of this "arising under" clause has never been precisely determined, it is clear that section 1331(a) contemplates that the court must find that the law of the United States, in one form or another, is the basis of the dispute. The case at hand clearly arises under the Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq.* The ultimate resolution of this case will involve a determination of whether the defendants have abided by the provisions of the Act in taking title to the land at issue in trust. Although the statute to which section 1331(a) looks in any particular case may limit the court's exercise of subject matter jurisdiction, *Association of American Medical Colleges v. Califano,* 569 F.2d 101, 106-108 (D.C. Cir. 1977), the Indian Reorganization Act contains no such statutory restriction. Therefore, this court does have subject matter jurisdiction of this case pursuant to 28 U.S.C. § 1331 and 25 U.S.C. §§ 461 *et seq.* The court will now turn to consideration of whether the exercise of this jurisdiction is barred by either of the two remaining arguments advanced by defendants.

III. United States as Indispensable Party: The Problem of Sovereign Immunity.

Defendants argue that the United States is an indispensable party to this litigation since the title to the tract in question was transferred not to the Department of the Interior, Bureau of Indian Affairs, or officers thereof, but to the United States itself. Defendants further argue that since this title has been passed to the United States, this is primarily a suit

concerned with title to property, and that pursuant to 28 U.S.C. § 2409a, the United States has not consented to be sued regarding land taken in trust for the indians. Plaintiffs have replied that the United States is adequately represented by the named defendants, and that in any case, this suit is not barred by the doctrine of sovereign immunity since this is primarily a lawsuit to review agency action as allowed by 5 U.S.C. § 701, *et seq.*

With regard to defendants' assertion that the United States is an indispensable party to this action, Congress, in its recent amendments to 5 U.S.C. § 703, has sought to eliminate such contentions. Although the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, do not serve to provide an independent basis for subject matter jurisdiction, it cannot be said that this Congressional enactment is a total nullity. Rather, 5 U.S.C. §§ 701-706 provide a blueprint for suits brought to review agency action. After the definitional and policy statements of 5 U.S.C. §§ 701 and 702, section 703 provides rules for the form of this type of action, and establishes guidelines for venue. Section 704 allows that only certain types of agency action may be reviewed. Section 705 provides for relief pending review, and section 706 defines the scope of review. Whatever else this case may involve, it is clear that this court must engage in some type of review of the actions of the Department of the Interior. As such, this suit must follow the outline supplied by Congress in 5 U.S.C. §§ 701-706.

When Congress amended 5 U.S.C. § 703 to eliminate the contention that the United States was an indispensable party to suits seeking judicial review of agency action, the House Judiciary Committee stated:

> Despite these attempts [to simplify pleadings in cases seeking judicial review of administrative action], problems persist involving parties defendant in actions for judicial review. In the committee's view the ends of justice are not served when government attorneys advance highly technical rules in order to prevent a determination on the merits of what may be just claims.

> When an instrumentality of the United States is the real defendant, the plaintiff should have the option of naming as defendant the United States, the agency by its official title, appropriate officers, or any combination of them. The outcome of the case should not turn on the plaintiff's choice.

H. Rep. No. 94-1656, 94th Cong., 2d Sess. 17-18 (Sept. 22, 1976), *as reprinted in* [1976] U.S. Code Cong. & Ad. News Service 6121, 6138. Despite this clear expression of Congressional disfavor for the defense of lack of indispensable parties, defendants have attempted to justify their position by citing a number of cases indicating that the United States is an indispensable party whenever a suit involves property held by the United States. Leaving aside for a moment the question of the applicability of these cases to the suit at hand, this court notes that all of the cases cited by defendants were decided before Congress amended section 703. As such, it would appear that none of these cases can overcome the strong expression of Congressional intent cited above. It would truly be contrary to the interests of justice to dismiss this suit on this ground when the United States, although titular trustee of the lands in question, has delegated all control over the lands in question to the officers and agencies already named as parties defendant. The court therefore rejects the argument that the failure to join the United States as a party requires dismissal of this action.

The fact that the United States is not itself an indispensable party to this suit does not, however, dispose of defendants contention that this suit is barred by the doctrine of sovereign immunity. In Public Law 94-574, Congress not only eliminated the jurisdictional amount for suits against the United States and abolished the defense of lack of indispensable party in suits for judicial review of agency action, but also substantially limited the applicability of the doctrine of sovereign immunity. This limitation was accomplished by amending 5 U.S.C. § 702, which now states in pertinent part:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under

> color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States . . . . Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Defendants contend that 28 U.S.C. §§ 2409a & 2410, in which the United States has consented to be sued in certain cases involving real property interests, not only specifically exempt indian trust lands from this consent, but also represent a Congressional pre-emption of this area. In other words, defendants claim that the United States has consented to no other suits involving real property interests except those specifically listed. Plaintiffs have answered that both sections 2409a and 2410 are inapplicable to the suit at hand, and that Congress in passing these sections dealt only with particular problems and did not intend to preempt the area.

28 U.S.C. § 2409a states in pertinent part:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands . . . .

28 U.S.C. § 2410 contains a similar provision for lands on which the United States has a lien. Clearly, section 2410 alone is irrelevant to this case since no lien interests are involved. However, section 2410 has been cited by defendants in support of their contention that Congress, in enacting sections 2409a and 2410, meant to indicate the only times in which the United States would consent to any suit involving any real property interest held by the United States. In essence, defendants

contend that sections 2409a and 2410, when read as an indication of a broad, preemptive Congressional intent, fulfill the requirements of 5 U.S.C. § 702(2), that is, that the statutes expressly or impliedly prohibit the granting of the relief sought. Neither statute expressly states such a preemptive intent, so defendants' arguments in this regard must rest on the implications which may be drawn from these two enactments. However, no fair readings of these statutes would permit this court to draw the inferences suggested by defendants. By their language and by their legislative history, both section 2409a and 2410 were designed to remedy specific problems. Section 2410 dealt with the defense of sovereign immunity in suits regarding lands on which the United States had a lien. As indicated earlier, such lien interests are not involved in this suit. Section 2409a was designed to deal with the same defense in actions to quiet title to property in which the United States had an interest. As shall be demonstrated, *infra*, the present case is not a quiet title action within the meaning of this statute. The legislative history is devoid of any hint of a broad Congressional intent such as defendants suggest. It appears, therefore, that Congress did not intend to foreclose relief in other types of suits involving United States property interests. As such, defendants' argument on this basis must fail, and it only remains to be determined whether section 2409a, by its express terms, would allow invocation of the doctrine of sovereign immunity in this case.

Defendants contend that section 2409a, with its express exclusion of indian trust lands, indicates that the United States has not consented to be sued regarding such lands in any way. However, section 2409a has a much narrower application. The House Judiciary Committee, reporting on the bill which eventually was passed as P.L. No. 92-562, which contained the provisions of section 2409a, indicated that the purpose of the bill was "to allow the United States to be made a party to actions in the United States District Courts to quiet title to lands in which the United States claims an interest." H. Rep. 92-1559, 92d Cong., 2d Sess. 1 (Oct. 10, 1972), *as reprinted in* [1972] U.S. Code Cong. & Ad. News 4547. The report indicates that Congress felt the amendment would be applicable to those actions based on the English equitable bill of *quia timet*, and

that the most common applications of this amendment would be to permit suits to settle boundary disputes between contiguous properties or to allow a plaintiff to assert less than a fee simple absolute interest in the property at issue. *Id.* at 4551-52. In order to accomplish this limited purpose, Congress set out in 28 U.S.C. § 2409(c) the requirements for a valid complaint under this section. Such a complaint is required to state with particularity the nature of the right, claim, or interest plaintiff possesses in the property at issue. Plaintiffs in the present case clearly cannot meet this requirement since they possess no legally recognizable property interest in the 76 acre tract at issue. Plaintiffs merely seek to reestablish their right to exercise their police and taxing powers over the tract and the people and activities thereon. Since plaintiffs do not possess the type of property right which would be necessary for the maintenance of a quiet title action, it is clear that 28 U.S.C. § 2409a is inapplicable to this suit, and may not, therefore, force dismissal of this suit due to the doctrine of sovereign immunity. This suit does require review of administrative action, and sovereign immunity for such suits has been waived in 5 U.S.C. § 702. In the interests of "fairness and accountability in the administrative machinery of government," H. Rep. No. 94-1654, *supra,* at 9, *as reprinted in* [1976] U.S. Code Cong. & Ad. News at 6130, defendants argument must be rejected.

IV. The Sault Ste. Marie Indian Tribe as an Indispensable Party: The Problem of Tribal Sovereign Immunity.

Defendants' second argument in support of their motion to dismiss is that the purported indian tribe in this suit is an indispensable party. Defendants further indicate that despite the tribe's status as an indispensable party, this court cannot compel joinder since this court has no jurisdiction over the tribe, which is located in Michigan, and because the tribe, as a quasi-independent nation, is protected from suit by the doctrine of sovereign immunity. As for this second advancement of the doctrine of sovereign immunity, although it is true that an indian tribe or nation may not be sued without its consent, *Lomayaktewa v. Hathaway,* 520 F.2d 1324, 1326 (9th Cir. 1975), *cert. denied* 425 U.S. 903 (1976), this protection applies only to the tribe and not to individual indians. *Santa Clara Pueblo v. Martinez,* 98 S.Ct. 1670, 1677 (1978). Congress, in

the exercise of its plenary power to limit the right of self-government of the indian nations, has indicated that certain prerequisites exist before a group of indians may be considered a tribe and thereby be eligible for a special status in the law. *See* 25 U.S.C. § 477-479 (the indians must all live on the same reservation, and must have adopted an organizational plan or constitution). Neither Congress nor the Department of the Interior may create a tribe where none exists within the meaning of the Indian Reorganization Act. *United States v. State Tax Commission of the State of Mississippi,* 535 F.2d 300, 306 (5th Cir. 1976). Cognizant of the fact that this court must view the facts in the light most favorable to the plaintiffs in determining this motion to dismiss, it appears that the complaint does raise a genuine issue with regard to the legality of the Interior Department's dealing with this group of indians as a tribe. Without a valid tribal status, these indians are unprotected by the doctrine of sovereign immunity. It would be anomalous indeed to permit this disputed tribal status to serve as a bar to the disposition of this case which has as one of its central issues the validity of that status. Therefore, tribal sovereign immunity does not bar this suit.

As for defendants' contention that this group of indians as a tribe is an indispensable party, and that this court must therefore dismiss this suit for lack of jurisdiction over that indispensable party, it should be noted that the indians' primary interest in this suit is as beneficiary of the land trust. Plaintiffs do not question the validity of the sale of the 76-acre tract to the indians, nor would they have standing to do so. Rather, plaintiffs challenge an administrative action taken by defendants after the indians purchased the land in question. It is apparent that the full resolution of the issues presented in this case will require this court to decide whether the Interior Department acted in accordance with the law in treating the indians as a tribe for the purposes of taking the land in question in trust. Although the tribe might be expected to be an indispensable party when such a legal determination is at issue, *see* Fed. R. Civ. P. 17 & 19, there is a well-recognized exception in light of the special relationship between the federal government and the indian nations. The indians occupy, rather than

enjoy, "a peculiar and protected status as wards of the Federal government." *Gray v. United States,* 394 F.2d 96, 98 (9th Cir. 1967). The provisions in the Indian Reorganization Act providing that the United States may take land in trust for indian tribes is one manifestation of this special relationship since it allows the government to secure areas in which the indian nations may operate as the semi-autonomous peoples the law recognizes them to be. Although this relationship may have abused the indian nations as often as it has benefited them, the court is not in the position of questioning this Congressional policy of stewardship. Rather, it appears that the United States in this case occupies its traditional role of guardian along with its statutory position of trustee. Congress' power in this area is plenary; whatever autonomy the indian nations enjoy, even down to their very status as tribes, exists only due to Congressional action. Under the present state of the law, harsh though it may be, if this case raises issues in which the United States may adequately represent and protect the indian group herein involved, then the purported tribe is not an indispensable party to this action. *Cheyenne River Sioux Tribe v. United States,* 338 F.2d 906, 910 (8th Cir.), *cert. denied* 382 U.S. 815 (1964); *Pan American Petroleum Corp. v. Udall,* 192 F. Supp. 626, 628 (D.D.C. 1961).

This suit concerns an area in which the federal government controls all action. The determination of tribal status and the taking of land in trust have been committed to the Department of the Interior in Congress' exercise of its plenary power. 25 U.S.C. § 2. This court must "tread lightly" so as to avoid infringing on this area reserved to Congress. *Santa Clara Pueblo v. Martinez, supra,* 98 S. Ct. at 1678. It appears that the federal defendants, as trustees and guardians of the indians, will adequately represent the interests of the indians who are the beneficiaries of the trust at issue here. As such, the indians are not indispensable parties and this court does have jurisdiction over this suit.

V. Subsidiary Claims.

In addition to the contention that the entire case should be dismissed, defendants move for the dismissal of three of plaintiffs' subsidiary claims. Specifically, plaintiffs have

claimed: (1) that the government violated due process of law when it took the land in trust and then refused to grant plaintiffs an administrative hearing regarding the tax consequences; (2) that defendants have failed to file an environmental impact statement for the proposed low-income housing project to be built on the land, and that therefore construction should be enjoined; and (3) that section 5 of the Indian Reorganization Act is an unconstitutional delegation of legislative power without appropriate standards.

The latter two claims are easily disposed of. The claim pursuant to N.E.P.A. is deficient because the Department of the Interior and the other defendants in this case have no control over the proposed housing project to be built on the land, and therefore cannot be held in account for the lack of an E.I.S. The delegation claim fails because, even though the acquisition of lands in trust is discretionary with the Secretary, *see* 25 U.S.C. § 465, the legislative history and the Act itself, providing as it does a definition of an indian tribe, do provide adequate standards for the exercise of this discretion. This is not to intimate any opinion as to whether those standards have been met in this case. Rather, it is simply to demonstrate that the delegation theory lacks merit.

The due process claim is somewhat more difficult to deal with. At least one court has held that a city such as plaintiff is a "person" within the meaning of the due process clauses of the Fifth and Fourteenth Amendments. *Township of River Vale v. Town of Orangetown,* 403 F.2d 684, 686 (2d Cir. 1968). As for the question of whether the power to tax property is itself a property right within the contemplation of the Amendments, it is apparent that the power to levy a property tax is one of those powers reserved to the states by the Tenth Amendment, *see Miller v. Bauer,* 517 F.2d 27, 30 (7th Cir. 1975), and that in this case the state of Michigan has delegated this authority to the City of Sault Ste. Marie. It might therefore be said that the City has a statutory expectancy that it will continue to retain this right. *See Board of Regents v. Roth,* 408 U.S. 564 (1972). In the somewhat analogous area of eminent domain, it is clear that the government owes the holder of a property right some form of due process before taking such property, even if only to

determine the true value of the property seized. *Miles v. District of Columbia,* 510 F.2d 188, 192 (D.C. Cir. 1975). Once again viewing the allegations in the complaint in the light most favorable to plaintiff, it cannot be said that this claim must be dismissed. Although Congress does possess plenary power in this area, such power must be exercised, either by Congress or its delegate, in a fair and orderly way. Since it does not appear that Congress in passing the Indian Reorganization Act, even contemplated that the government would take in trust land already within the organizational control of an existing municipality, a question is raised regarding the propriety of the Interior Department's actions in the absence of some sort of hearing. To be sure, neither the Act nor any state statute requires such a hearing, and the disposition of this motion will not decide the merits of this claim, but since a question exists in this area, and since this court's jurisdiction of this claim is not otherwise barred, the due process claim will not be dismissed at this time.

VI. Conclusion.

The court in *City in Tacoma, supra,* noted that it is unfortunate that the government has taken in trust indian lands which are already subject to the jurisdiction of preexisting municipal corporations. The creation of discrete enclaves of indian reservation land within organized municipalities creates havoc as the city or county attempts to enforce its criminal, health and land use ordinances. There are, of course, strong equitable considerations on both sides of this dispute. The parties in the present case have agreed not to allow any further taking of lands in trust within the city limits until this suit is disposed of. This self-imposed stay, along with the court's decision today to retain jurisdiction over most of the issues in this suit, will hopefully allow for a reasonable resolution to the troublesome issues presented in this case.

An appropriate Order accompanies this Memorandum.

THOMAS A. FLANNERY

United States District Judge

Dated: 8-31-78

UNITED STATES CONSTITUTION, FIFTH AMENDMENT

No person shall . . . be deprived of life, liberty or property, without due process of law . . .

THE 1934 INDIAN REORGANIZATION ACT (48 Stat. 984)

* * *

SEC. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year . . . .

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

* * *

SEC. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided,* That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

* * *

SEC. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. . . .

18 U.S.C. SECTION 1151, INDIAN COUNTRY DEFINED

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139, § 25, 63 Stat. 94.

25 C.F.R. SECTION 1.4, STATE AND LOCAL REGULATION OF THE USE OF INDIAN PROPERTY

(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

(b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. In determining whether, or to what extent, such laws, ordinances, codes, resolutions, rules or other regulations shall be adopted or made applicable, the Secretary or his authorized representative may consult with the Indian owner or owners and may consider the use of, and restrictions or limitations on the use of, other property in the vicinity, and such other factors as he shall deem appropriate.

[30 FR 7520, June 9, 1965]

Opposition

1

No. 81-2090

In the Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF SAULT STE. MARIE, MICHIGAN, PETITIONER

v.

JAMES G. WATT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether respondent Sault Ste. Marie Tribe of Chippewa Indians is a "tribe" for purposes of Section 5 of the Indian Reorganization Act, 25 U.S.C. 465.

2. Whether the Secretary's acceptance of a tract of land in trust for the Tribe pursuant to Section 5 of the Indian Reorganization Act for purposes of constructing there a federally funded housing project was unlawful because the Tribe was not absolutely "landless" at the time or because the Tribe had first purchased the tract and then conveyed it to the Secretary.

3. Whether the procedures followed by the Secretary in accepting the land in trust violated due process rights of petitioner City because of the incidental effect on the City's tax base or the applicability of certain regulations to the land.

4. Whether 25 C.F.R. 1.4(a), providing that State and local law controlling land use and development shall be inapplicable to Indian trust land, is invalid on its face notwithstanding provisions in the regulation itself for application of State and local law in appropriate circumstances.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The district court's opinion granting in part and denying in part the defendants' motion to dismiss (Pet. App. 27a) is reported at 458 F. Supp. 465. The district court's opinion granting summary judgment for the defendants (Pet. App. 11a-24a) is reported at 532 F. Supp. 157, and the district court's memorandum opinion modifying that opinion (Pet. App. 6a-8a) is reported at 532 F. Supp. 167. The judgment order of the court of appeals (Pet. App. 3a-4a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3a-4a) was entered on November 25, 1981. A timely petition for rehearing was denied on January 12, 1982 (Pet. App. 1a-2a). By order of the Chief Justice, the time for filing a

petition for a writ of certiorari was extended to and including May 12, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Sault Ste. Marie Tribe of Chippewa Indians, with a population of slightly more than 5,000, resides principally in the eastern portion of the Upper Peninsula of Michigan. Approximately one-half of the members of the Tribe reside in Chippewa County, of which the City of Sault Ste. Marie is the county seat. J.A. 475-479.[1]

In January 1977, the Tribe purchased a 76-acre, privately owned tract of land in the southeast corner of the City of Sault St. Marie, on which the Tribe planned to build a housing project and community center. At the time, the Tribe also owned a 40-acre uninhabited tract on Sugar Island in St. Mary's River, Chippewa County. That tract, however, had been rejected by the Department of Housing and Urban Development as a housing site based on findings that the island lacked fire protection, schools, and medical facilities and that it would be prohibitively expensive for members of the Tribe to commute to the mainland to work (J.A. 508-510).

In March 1977, title to the Tribe's 76-acre tract in Sault St. Marie was transferred to the United States pursuant to Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. 465, which authorizes the Secretary of the Interior, "in his discretion, to acquire * * * any interest in lands, * * * within or without existing reservations, * * * for the purpose of providing land for Indians." Section 5 provides that title to lands so acquired "shall be taken in

[1] "J.A." refers to the Joint Appendix in the court of appeals.

the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands * * * shall be exempt from State and local taxation." The City filed this action in the United States District Court for The District of Columbia in August 1977 challenging the Secretary's authority to accept the land in trust and seeking a declaratory judgment that it retained criminal and regulatory jurisdiction over the tract. Federal funding for a proposed 65-unit housing project on the site was set aside in September 1977. J.A. 490.

2. While the instant action was pending in district court in the District of Columbia, the United States filed an action in the United States District Court for the Western District of Michigan in 1978 pursuant to Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*, against the City and certain of its officials. The suit alleged that the defendants had unlawfully interfered with a federally funded housing program by declining to furnish municipal services to the proposed housing site on the 76-acre tract. J.A. 490, 511. On February 8, 1979, the district court approved a consent decree settling the Title VIII suit. In the consent decree, the City, while denying any violations of Title VIII, agreed to furnish all present and future municipal services without discrimination on the basis of race and to provide water and sewer services to the proposed 65-unit housing project to be built on the 76-acre tract. J.A. 511-513. The City further agreed that the Sault Ste. Marie Tribe is a "tribe" for purposes of the Indian Housing program of the Department of Housing and Urban Development (see 24 C.F.R. Part 805) and undertook to "cooperate fully" with the Tribal Housing Authority "to expedite the completion of the project and to prevent further unreasonable delay in construction." J.A. 514.

The consent decree also incorporated by reference two agreements between the City and the Tribal Housing Authority pertaining to the project. J.A. 513, 518-532. In those agreements, the parties stipulated that the housing project is exempt under the constitution and statutes of the State of Michigan from all real and personal property taxes levied by the City, whether or not the 76-acre tract was properly taken in trust by the Secretary pursuant to Section 5 of the IRA; that the City accordingly would not levy such taxes against the project, whatever the trust status of the land; and that the Tribal Housing Authority would make an annual payment to the City in lieu of taxes in the amount of 10% of the aggregate rent charged by the Authority. J.A. 518, 519, 525, 526. Insofar as it could lawfully do so, the City further agreed to grant such deviations from its building code as would be reasonable and necessary to promote economy, efficiency, health and safety in the project and to make such changes in any zoning of the site and surrounding land as would be reasonable and necessary to develop and protect the project. J.A. 521, 528-529. Finally, the Housing Authority agreed voluntarily to comply with "all applicable civil regulations" of the City, including building, safety and zoning codes (as they may reasonably be modified in the manner described above), even though the land is held in trust by the United States. J.A. 525, 531.[2]

3. In an opinion dated August 29, 1980, the district court sustained the validity of the Secretary's taking of the 76-acre tract in trust pursuant to Section 5 of the IRA.

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[2] The agreement stated in this regard that it was not to be construed as a recognition by the Housing Authority that the City has authority to enforce such regulations on the project (J.A. 531), although the Authority's compliance presumably could be enforced judicially under the terms of the consent decree.

Pet. App. 11a-20a.[3] The district court held that the Sault Ste. Marie Tribe of Chippewa Indians continues to hold rights under the Treaty of March 28, 1836, with the Ottawa and Chippewa Indians, 7 Stat. 491, and therefore was a recognized Tribe in 1934 when the IRA was enacted. Pet. App. 14a-15a, citing *United States* v. *Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), aff'd in relevant part, 653 F.2d 277 (6th Cir.), cert. denied, No. 81-549 (Dec. 14, 1981). Relying on its recent decision in *City of Tacoma* v. *Andrus*, 457 F. Supp. 342 (D.D.C. 1978), the court also rejected the City's contention that Section 5 of the IRA permits the acquisition of land only for entirely "landless" Indians and that Section 5 did not permit the Secretary to acquire lands in trust for the Tribe if those lands previously were owned by the Tribe. Pet. App. 15a-16a.

The district court found no merit in the City's argument that the procedures utilized in acquiring the land violated its due process rights. Although it held that the City is a "person" within the meaning of the Due Process Clause and that its taxation and regulatory powers were protectible property interests (Pet. App. 17a), the court concluded that the City had received all the notice and opportunity to be heard that was constitutionally required. The court noted that the City "received a great deal of actual notice" of the Secretary's plans to take the land in trust (*id.* at 18a). Similarly, the court held that the City had an adequate opportunity to be heard at a public hearing called by the City Commission on the trust status

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[3] The district court previously had denied the defendants' motion to dismiss on standing, subject matter jurisdiction, and sovereign immunity grounds. Pet. App. 27a-39a. These issues are not involved here.

of the land, which was attended by all members of the City Commission and other City officials as well as a representative of the Bureau of Indian Affairs and representatives of the Tribe (*id.* at 20a). In a subsequent opinion, the court modified its decision on the due process claim to hold that the City is not a "person" for purposes of the Due Process Clause (*id.* at 6a-8a).

Finally, the district court ruled that the City was precluded from applying its land use regulations to the tract by 25 C.F.R. 1.4(a), which provides that, except as the Secretary adopts or makes them applicable, the laws or ordinances of a State or its political subdivisions controlling the "use or development" of real or personal property shall not apply to land held in trust for an Indian Tribe (Pet. App. 20a-24a). The court declined, however, to rule on whether the tract was subject to state criminal jurisdiction, finding the issue not ripe for adjudication. The district court observed that the planned housing project had not yet been built and the land therefore was uninhabited and reasoned that in these circumstances, it "[could not] possibly evaluate such matters as the relationship of the inhabitants of the area with the Tribe or the type of organization that will eventually be established on the land" (*id.* at 21a) in order to determine whether it would be a "dependent Indian community" and therefore "Indian country" for purposes of 18 U.S.C. 1151(b).

4. The court of appeals affirmed by judgment order, "generally for the reasons stated in the district court's memorandum opinion filed August 29, 1980" (Pet. App. 3a-4a). In a footnote, however, the court of appeals stated that "[w]ith respect to the question whether the City as such was constitutionally entitled to due process, we find that the City received all the process it was due, however the question is answered" (*id.* at 4a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any court of appeals. Moreover, the various issues the City seeks to raise are of little continuing significance in the context of this case, and the Secretary of the Interior has since promulgated regulations governing the exercise of his authority under Section 5 of the Indian Reorganization Act and similar statutes addressing those issues for future cases. Review by this Court therefore is not warranted.

1.a. The controversy giving rise to this lawsuit surrounded the Tribe's plans to develop a housing project on the 76-acre tract of land taken in trust by the United States for that purpose. The City objected to the housing project and the attendant trust status of the land principally because of the loss of tax revenues when the land was taken into trust and the inapplicability of the City's zoning, building, and safety laws to the project (Pet. App. 12a). The bases of these concerns may be questioned even as an original matter. The taxes levied on the land prior to the trust acquisition averaged less than $100 annually. J.A. 490. Moreover, as detailed in a Report of the Michigan Advisory Committee to the U.S. Commission on Civil Rights included in the record in the case (J.A. 370, 393-423), the area of Sault Ste. Marie inhabited by members of the Tribe was the poorest in the City and lacked adequate sanitation or storm sewers, running water, paved roads, fire hydrants, street lights, paved streets, and recreational facilities when compared to non-Indian parts of the City. See J.A. 456. Based upon its study, the Advisory Committee found "a pattern of discriminatory neglect in the provision of city-funded municipal services" (J.A. 458).

Whatever their initial merit, however, the asserted grounds for the City's concerns about the housing project no longer obtain. As part of the consent judgment in *United States* v. *City of Sault Ste. Marie*, the suit under Title VIII of the Civil Rights Act of 1968, the City has agreed that the housing project is exempt as a matter of *State* law from real and personal property taxes, whatever the trust status of the land. Moreover, under those agreements, the City will receive payments in lieu of taxes that no doubt will be substantially in excess of the property taxes realized by the City before the Tribe commenced the project. J.A. 518-519, 525-526. The tax consequences of the trust status of the land therefore are of no continuing importance in this case.

Similarly, as explained above, the City agreed in the consent decree in the Title VIII suit to facilitate the development of the housing project, even to the extent of assuming an obligation in the accompanying agreements with the Tribal Housing Authority to modify its zoning and building codes where necessary. J.A. 521, 528-529. The City has, in short, accepted the fact of the housing project, and construction of the project is now substantially underway. Pet. 3. It therefore is far too late for the City fairly to raise an objection to the project on zoning or land use grounds. See Pet. 7-10.

The City's concern about the application of its related building and safety codes is likewise without merit. The Tribal Housing Authority has agreed to abide by those codes as part of the consent decree in the Title VIII suit. J.A. 531. We have been informed by counsel for the Tribe that the construction contract for the project requires the contractor to obtain the necessary City permits and to pay the usual fees, and that appropriate City and State inspections of the construction have occurred. Cf. 25 C.F.R. 1.4(b). Against this background, the City cannot

argue that the application of its zoning, building, and safety laws has been significantly impaired; and indeed, the City makes no substantial argument to this effect.

b. In addition, since the district court's decision in this case, the Secretary has issued regulations governing the exercise of his authority under Section 5 of the IRA. Those regulations address many of the City's concerns in this case. See 25 C.F.R. Part 120a. For example, considering a request by a Tribe for the acquisition of land in trust status, the Secretary must now consider, *inter alia*, the need of the Tribe for additional land and the purpose for which the land is to be used. 25 C.F.R. 120a.10(b) and (c). Of particular significance in this case, the regulations further require consideration of "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls," 25 C.F.R. 120a.10(e), and "[j]urisdictional problems and potential conflicts of land use which may arise," 25 C.F.R. 120a.10(f). To ensure an opportunity for comment on these potential impacts, the Area Directors of the Bureau of Indian Affairs were instructed by the Office of the Secretary on November 30, 1980, soon after the land acquisition regulations were promulgated, to notify affected governmental units of the proposed acquisition and to afford them 30 days to comment on the proposal.

There is every reason to believe that these regulations will ensure that the Secretary's land acquisition responsibilities are carried out in a manner that minimizes the adverse effects on the local tax base, land use planning and control, and regulatory jurisdiction.[4] There is, ac-

[4] The Interior Department regulations governing trust lands that the City challenges in this case contemplate a similar accommodation of State and local interests by authorizing the Secretary to make State or local law applicable to Indian lands in appropriate cases. 25 C.F.R. 1.4(b); see pages 17-18, *infra*.

cordingly, no justification for the City's contention (Pet. 6-7) that certiorari should be granted because of the possible impact of future land acquisition programs.

2. In any event, the courts below correctly resolved the legal issues presented:

a. The City contends (Pet. 16) that the respondent Sault Ste. Marie Tribe is not a "tribe" for purposes of the IRA, including Section 5 of that Act authorizing the Secretary to acquire land in trust for a "tribe." Assuming arguendo that the City is correct (Pet. 16) that a "tribe" for purposes of the IRA must be one that was federally recognized in 1934, when the Act was passed, the Sault Ste. Marie Tribe plainly satisfies that standard.

It apparently is conceded in this litigation that the Tribe is an "historic band" (Pet. App. 13a) and that it is descended from the Chippewa Indians, who, along with the Ottawas, entered into the Treaties of March 28, 1836 and July 31, 1855 with the United States. 7 Stat. 491; 11 Stat. 621. See also *United States* v. *Michigan*, 471 F. Supp. 192, 249 (W.D. Mich. 1979), aff'd in relevant part, 653 F.2d 277 (6th Cir.), cert. denied, No. 81-549 (Dec. 14, 1981). The City contended below that the 1855 Treaty had dissolved the Chippewa Tribe. See Pet. App. 14a. However, as the district court correctly noted, the July 1855 Treaty merely dissolved an "artificial amalgam of the Ottawas and the Chippewas" (Pet. App. 14a), as evidenced by the fact that the United States subsequently entered into another Treaty with the Chippewas on August 2, 1855. 11 Stat. 631. The Tribe's continued entitlement to and enjoyment of rights under the 1836 Treaty, through 1934 to the present day, is a fully sufficient basis for concluding that the Tribe was federally "recognized" when the IRA was enacted in 1934.

The district court's conclusion that the Sault Ste. Marie Tribe has rights under the 1836 Treaty that were not

abrogated by the Treaty of July 31, 1855 is fully consistent with the conclusion of the Sixth Circuit in affirming the district court's decision on this point in *United States* v. *Michigan*, *supra*. There, the court held that the Sault Ste. Marie Tribe has fishing rights under the 1836 Treaty. The Michigan Supreme Court likewise has held that the fishing rights secured by the 1836 Treaty were not abrogated by the 1855 Treaty and remain in effect. *People* v. *LeBlanc*, 399 Mich. 31, 248 N.W.2d 199 (1976). This Court denied the certiorari petition filed by the State of Michigan raising these issues concerning the Tribe's Treaty rights in *Michigan* v. *United States*, No. 81-549, and, we submit, ought to decline review here as well.[5]

b. The City also argues (Pet. 12-14) that Section 5 of the IRA authorizes the Secretary to acquire land only for "landless" Indians. In the City's view, the Tribe did not satisfy this standard, apparently because the Tribe already owned the 40-acre tract on Sugar Island in the St. Mary's River. The City's argument is premised on an erroneous interpretation of Section 5 that, as the City concedes (Pet. 14 n.13, 15 n.14), has been rejected by the

[5] The City complains (Pet. 16) that certain Interior Department memoranda written at an earlier date do not make clear that the Department, in 1934, regarded the Tribe as federally recognized. However, as the district court correctly noted, "although the question of whether some groups qualified as Indian tribes for purposes of IRA benefits might have been unclear in 1934, that fact does not preclude the Secretary from subsequently determining that a given tribe deserved recognition in 1934" (Pet. App. 14a). See *United States* v. *John*, 437 U.S. 634, 650-651 n.20 (1978).

other courts that have considered it.[6] See *Chase* v. *McMasters*, 573 F.2d 1011, 1015-1016 (8th Cir.), cert. denied, 439 U.S. 965 (1978); *City of Tacoma* v. *Andrus*, 457 F. Supp. 342, 345-346 (D.D.C. 1978). In addition, this Court rejected a similar argument in *Board of Commissioners* v. *Seber*, 318 U.S. 705, 710-711 (1943), that an Act of Congress declaring nontaxable certain lands held by the Secretary in trust for individual Indians did not apply where the Indians were not previously "landless."

Nor does the language of Section 5 suggest the limited scope the City urges. The Secretary is authorized to acquire "any interest in lands * * * for the purpose of providing land for Indians." There is no indication that the Indians involved must be entirely landless or destitute. The fact that land may be acquired under Section 5 within a reservation, where a tribe typically will have other land holdings, itself refutes such an extreme position. The City's cramped construction of Section 5 also would undermine the purpose of the IRA actively to promote the self-sufficiency of tribes, *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973), not simply to

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[6] In *Hydaburg Cooperative Association* v. *United States*, 667 F.2d 64, 67-68 (Ct. Cl. 1981), cited by the City (Pet. 14 & n.13), the issue was whether an Indian organization had a cause of action for damages against the United States under Section 5 for breach of trust, not the standards for the Secretary's acquisition of property. Although the Court of Claims cited references in the legislative history of the IRA to the fact that large numbers of Indians had become landless, that court also described Section 5 as intended to ensure "land adequate for the Indians' needs" and to meet the needs of "tribes whose land holdings are insufficient for self-support" (667 F.2d at 67, quoting S. Rep. No. 1080, 73d Cong., 2d Sess. 2 (1934)). There is no suggestion in the court's opinion that a tribe must be absolutely "landless." Thus, the Court of Claims' decision supports the validity of the Secretary's actions in this case.

relieve them of the most extreme poverty. Indeed, the City, somewhat inconsistently, appears to acknowledge elsewhere in its petition that land may be acquired under Section 5 for tribes that have "insufficient land" and that could "use the land beneficially" (Pet. 14). There can be no doubt that the 40-acre tract on Sugar Island, which was found by HUD to be unsuitable for housing, was "insufficient land" for the Tribe's needs, and there likewise can be no doubt that, by constructing a housing project on the 76-acre tract, the Tribe will "use the land beneficially."

In a similar vein, the City also argues (Pet. 14-15) that Section 5 does not authorize the acquisition of land from a tribe to be held in trust for that tribe. In such circumstances, the City argues, the Secretary is not "providing" lands for Indians, since they already own it. As the City concedes (Pet. 15 n.14), this argument too has been rejected by the only courts that have considered it. See *Chase* v. *McMasters*, *supra*; *City of Tacoma* v. *Andrus*, *supra*. As the Eighth Circuit observed in *Chase*, since the Secretary may purchase land for Indians and hold the land in trust for them, "[t]here is no prohibition against accomplishing the same result indirectly by conveyance of land already owned by an Indian to the United States in trust." 573 F.2d at 1016.

The text of Section 5 confirms the correctness of this conclusion. That Section authorizes the Secretary to acquire land not only by purchase, but also by "assignment," which plainly is broad enough to encompass the situation where a tribe assigns its interest in land to the Secretary. Similarly, the Secretary is authorized to acquire trust lands by "relinquishment," which "contemplates precisely the transactions engaged in here—a surrender of *title* by the grantor in favor of a *beneficial interest*." *City of Tacoma* v. *Andrus*, *supra*, 457 F. Supp.

at 346 (emphasis in original). In addition, Section 5 permits the Secretary to acquire not only fee lands, but also "trust or otherwise restricted allotments." It is clear from the last quoted portion of the statute and from the very materials cited by the City (Pet. 15) that the Secretary may take into trust for a tribe an allotment occupied by an individual Indian and then assign to the original Indian owner exclusive rights of use and occupancy of the same parcel. J.A. 183, 185, 187, 201. Such a transaction obviously was deemed by Congress to be for the statutory purpose of "providing land for Indians," notwithstanding the fact that no additional lands would be brought under Indian ownership. No reason appears why a different result should obtain in the instant case.

The City's argument also overlooks the fact that the Tribe's ownership of the land in this case was only several months in duration and was part of a broader transaction to acquire land for the housing project—precisely the sort of tribal undertaking the IRA was intended to encourage. The Solicitor of the Department of the Interior took the position as early as 1937 that the intended beneficiary could furnish the funds to purchase the land to be held in trust for his benefit, because Section 5 does not exclude from coverage Indians who have money they want to use for land purchases. J.A. 190. If, under this ruling, the Tribe could have furnished the money for the Secretary to acquire the 76-acre parcel from its original non-Indian owners, no reason appears why it could not produce precisely the same result by first purchasing the land itself and then conveying it to the United States. Finally, because the ultimate goal of the overall transaction was to develop a housing project intended in large measure to benefit tribal members, the Secretary's actions certainly had the effect of "providing" land and a place to live for those individual Indians, even if the trust acquisition

element of the overall transaction did not, viewed in isolation, literally "provide" additional land for the Tribe.

c. The City contends (Pet. 17-21) that the procedures followed by the Secretary in acquiring the tract in trust violated its due process rights because that acquisition deprived the City of authority to tax the land and to apply its ordinances to it without affording the City an opportunity to be heard.[7] The district court held, on reconsideration, that the City is not a "person" for purposes of the Due Process Clause. Pet. App. 6a-8a. This ruling would appear to be correct, in view of this Court's holding in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324 (1966), that a State—the progenitor of political subdivisions such as the City of Sault Ste. Marie—is not a "person" for purposes of that Clause. See *Aguayo* v. *Richardson*, 473 F.2d 1090, 1100-1101 (2d Cir. 1973).[8]

At all events, it may be doubted whether an incidental adverse effect on a State or local government's taxing or regulatory powers occasioned by the federal government's exercise of its delegated powers—here, the power

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[7] The City no longer contends that it did not receive adequate notice of the proposed acquisition, for as the district court found, the City "received a great deal of actual notice" of the proposed acquisition (Pet. App. 18a).

[8] The only decision cited by the City in support of its argument that it is a "person" for purposes of the Due Process Clause is *Township of River Vale* v. *Township of Orangetown*, 403 F.2d 684, 686 (2d Cir. 1968). As the district court observed (Pet. App. 7a), however, the validity of this holding in the Second Circuit is open to serious question in view of that court's subsequent decision in *Aguayo* v. *Richardson*, *supra*. In *City of Santa Clara* v. *Andrus*, 572 F.2d 660, 675 (9th Cir. 1978), also cited by the City (Pet. 18), the question whether a city is a "person" for purposes of the Due Process Clause was left open.

over Indian affairs—constitutes a deprivation of "property" within the contemplation of the Due Process Clause. This is not a situation, for example, that involves the termination of a direct financial or other benefit conferred by the federal government on a State or locality (compare *City of Santa Clara* v. *Andrus*, *supra*; *Aguayo* v. *Richardson*, *supra*) or a federal action undertaken for the specific purpose of regulating the State or local government's exercise of its powers (compare *South Carolina* v. *Katzenbach*, *supra*). Yet even in those circumstances, this Court's decision in *South Carolina* v. *Katzenbach* suggests that due process principles are inapplicable.

The normal and pervasive interaction of the respective powers of the State and Federal governments, fully anticipated by the Framers in the Supremacy Clause and subject to the checks of the political process, cannot be thought to trigger application of the Due Process Clause between dual sovereigns on every occasion of potential conflict. Such a holding would require notice and opportunity for some type of hearing for a vast array of federal actions.

The court of appeals did not decide these issues, however, because it affirmed the district court's holding that the City in any event received all the process that was due (Pet. App. 4a n.*). The district court held in this regard that the City received actual notice of the proposal and had an adequate opportunity to express its views at a City Commission meeting attended by a BIA official and tribal representatives (*id.* at 20a). In addition, in view of the controversy about the project, there can be little doubt that the BIA fully understood the nature of the City's objections to it.[9] Further consideration of this fact-bound

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[9] The need for and nature of an opportunity to be heard must be determined in large part by reference to the rights the City could

issue in the unique circumstances of this case is unwarranted. This is especially so in view of the Interior Department instructions now in effect providing for notice to affected cities and affording an opportunity for comment by them in future land acquisition cases, irrespective of whatever procedural requirements the Due Process Clause might impose.

d. Finally, the City contends (Pet. 7-10) that its land use ordinances are applicable to the 76-acre tract even if that tract was properly taken in trust by the United States. This issue plainly does not warrant review in this case, for the City has now agreed in the consent decree in the separate Title VIII suit to the very use of the land to which it previously objected and to *modify* its zoning laws and grant deviations from its building code to accommodate the project (J.A. 521, 528-529).

In any event, the City's challenge to the policy of the Department of the Interior, reflected in 25 C.F.R. 1.4, that State land use and development law is inapplicable on trust lands is without merit. The City's challenge necessarily is to the regulation on its face, for, at least in light of the consent decree in the Title VIII suit, the City can point to no area of controversy concerning the application of state zoning, building, or safety laws to the project. This facial challenge must fail.

First, a reading of 25 C.F.R. 1.4 establishes that the rule it announces is not absolute. Subsection (b) of the

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assert. In Section 5, Congress authorized the Secretary to acquire lands "in his discretion." Because the Secretary's powers are discretionary, the nature of any hearing required by the Due Process Clause would be correspondingly limited. Insofar as the City's contention that the Secretary exceeded his legal authority is concerned, the City has had a fully adequate opportunity to be heard in the instant suit. Cf. *Parratt* v. *Taylor*, 451 U.S. 527 (1981)).

regulation expressly provides for the Secretary to adopt or make applicable State and local law in appropriate circumstances. Thus, where the State's interests are substantial—such as in matters of safety and health (see, *e.g.*, 25 U.S.C. 231(1)), especially as they might affect land or persons outside the boundaries of the trust property—the regulation to which the City objects itself provides a means for accommodating those concerns. And even where State or local law is not applied in all its particulars, the Secretary may be expected to take into account the policies reflected in that law, as well as surrounding land use patterns, in determining the permissible uses of the trust land—just as federal officials responsible for selecting or administering other land held by the United States may be expected to consider State law and the uses of surrounding land in determining where to locate a facility or the uses to which federally owned land should be put. It is reasonable to expect that the Secretary's deference to State and local law and surrounding land use patterns would be highest where the trust lands are located outside the boundaries of a reservation. In view of these means of accommodation, to find the regulation facially invalid would be to " 'ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists.' " *Rice* v. *Norman Williams Co.*, No. 80-1012 (July 1, 1982), slip op. 9, quoting *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 446 (1960).

Second, it ordinarily must be presumed that whenever Congress authorizes the acquisition of property in the name of the United States—whether for a post office, park, military installation—it intends that the federal government, not the States or localities, will determine the uses to which the land will be put and the nature of the structures to be erected thereon. There is no reason to

believe that Congress intended otherwise when it enacted Section 5 of the IRA to authorize the Secretary of the Interior to acquire land to be held in the name of the United States for the benefit and use of Indians. Thus, the regulation at issue here, 25 C.F.R. 1.4(a), simply preserves to the Secretary, or to the Tribe in the absence of Secretarial regulation, the ordinary federal responsibility for determining the uses to which federal lands are to be put. As such, the regulation is a reasonable exercise of the Secretary's broad authority for the management of Indian affairs—in this case, the management of trust lands. 25 U.S.C. 2. See *Fidelity Federal Savings & Loan Association* v. *de la Cuesta*, No. 81-750 (June 28, 1982). It must be stressed that the regulation at issue here provides that State or local laws governing or controlling the "use or development of any real or personal property" shall be inapplicable to trust lands. It does not purport to work a complete ouster of State jurisdiction with respect to all activities occurring on trust land.

A reference to this Court's decision in *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), upon which the City erroneously relies (Pet. 8-10), is instructive in this regard. The case concerned taxes imposed by the State of New Mexico on a ski resort operated by a tribe outside of its reservation but on land that the Court regarded as trust land for purposes of Section 5 of the IRA. See 411 U.S. at 145. The Court held that the exemption of trust land from state taxes under Section 5 did not bar the application of the State's gross receipts tax to income the tribe derived from operating the resort. 411 U.S. at 155-158. At the same time, the Court held that Section 5 *did* bar application of the State's compensating use tax to the purchase of materials used to construct the ski lifts. The Court held that the use of permanent improvements upon the land was so intimately bound up

with the use of the land itself that the tax exemption for the land must apply to the improvements as well. 411 U.S. at 158-159. Having held that the State could not tax the materials used in construction of the ski lift, it is most unlikely that the Court would have countenanced the application of State land use law to bar the construction of the ski lifts and resort altogether or to dictate the manner in which they would be built. Similarly, in the instant case, just as Section 5 of the IRA bars the City from taxing the land held in trust for the Tribe or the housing project constructed thereon, the City—at least in the absence of special circumstances not present here, such as overriding State interests that would be affected outside of the boundaries of the trust lands—could not apply laws respecting the "use or development" of land (25 C.F.R. 1.4(a)) to bar construction of the project.[10]

Although it may be possible to imagine particular applications of 25 C.F.R. 1.4(a), literally read, that would inappropriately oust State law even where there was a compelling State interest involved, no such situation is presented here because the project has undertaken to conform with City ordinances. Indeed, such a situation is speculative in any setting because of the provisions in 25 C.F.R. 1.4(a) and 120a.10(e) and (f) for the Secretary to

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[10] The City presents in its petition (Pet. i, 22-27) the separate question whether the 76-acre tract is a "dependent Indian community" and therefore "Indian country" within the meaning of 18 U.S.C. 1151(b), and thereby subject to federal criminal jurisdiction. See 18 U.S.C. 1152. The district court concluded that this question, which would require a weighing of facts that could not be developed until the project was completed and inhabited, was not ripe for resolution (Pet. App. 21a). The court of appeals likewise did not address this question, and it therefore is not properly presented for review in this Court.

accommodate State and local concerns. For these reasons, and because the decision below sustaining the validity of 25 C.F.R. 1.4(a) on its face does not conflict with the decision of any other court of appeals, review in this case is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Opposition

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ALEXANDER L. STEVAS,

No. 81-2090

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

CITY OF SAULT STE. MARIE, MICHIGAN,

Petitioner,

v.

JAMES G. WATT, et al., and
SAULT STE. MARIE TRIBE
OF CHIPPEWA INDIANS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS IN OPPOSITION

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June 1982

QUESTIONS PRESENTED

Petitioner's questions restated to reflect the record are:

1. Does a city have such complete land use jurisdiction over land owned by the United States in trust for an Indian tribe within the city's boundaries that it can forbid a federally-sponsored Indian housing project?

2. Did defendant Interior Department officials exceed their lawful authority under 25 U.S.C. § 465 by accepting trust title to the land at issue?

3. a. Did defendant Interior Department officials exceed their lawful authority when they determined that the Sault Ste. Marie Tribe of Chippewa Indians is a tribe within the meaning of 25 U.S.C. § 479?

b. Is petitioner City barred by collateral estoppel from challenging the Tribe's status?

4. a. Does the fifth amendment's Due Process Clause guarantee procedural protections to a city whenever the United States acquires property within the city?

b. Was petitioner City denied due process of law when the land at issue was taken in trust by the United States for the Tribe?

5. a. Was petitioner City's claim of criminal jurisdiction over tribal trust land ripe for adjudication?

b. Is the tribal trust land at issue Indian country as defined in 18 U.S.C. § 1151, or will it be Indian country if inhabited by a community of tribal Indians under federal supervision?

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In addition to petitioner's statement, the Court of Appeals' summary affirmance is reported at 672 F.2d 893 (D.C. Cir. 1981).

ADDITIONAL STATUTE INVOLVED

Act of Feb. 15, 1929, c. 216, 45 Stat. 1185, codified as amended at 25 U.S.C. § 231 [relevant part only]

The Secretary of the Interior, under such rules and regulations as he may prescribe, shall permit the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments therein (1) for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations . . .

STATEMENT OF THE CASE

This case grows out of petitioner City's efforts to block a HUD housing project on tribal trust land in the

southeast part of the City. For many years this area, known locally as the "Mar-Shunk" district, has been inhabited mostly by Indians of the Sault Ste. Marie Tribe of Chippewas. A. 394, 487. [1] It is set off from the rest of the City by "woods, streams, and piles of industrial waste." A. 487.

The Mar-Shunk community is the City's poorest and until recently received almost no municipal services. A 1976 report of the Michigan Advisory Committee to the U.S. Commission on Civil Rights detailed the lack of sanitation or storm sewers, running water, paved roads, fire hydrants, street lights, snow removal, parks, playgrounds, and sidewalks. A. 393-423. This Committee found "a pattern of discriminatory neglect" in failing to provide Mar-Shunk with

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1/ A. refers to the appendix in the Court of Appeals.

municipal services supported by local taxes, by federal revenue sharing funds, and by federal categorical aid. A. 456-62.

Mar-Shunk housing is very poor, and the area has been at the end of the storm sewers for much of the rest of the City, "a dumping ground." A. 396. This has caused health problems. A. 397-98. Michigan Governor William Milliken "called Mar-Shunk 'a deplorable situation' and after personally touring the area in 1974 he characterized the living conditions as 'incredible'." A. 395. The Advisory Committee found that the City had discriminated against Mar-Shunk Indians in using federal housing funds. A. 461-62.

The Sault Ste. Marie Tribe is trying to build a HUD-financed housing project to improve living conditions for its . mbers in and around Sault Ste. Marie. HUD's practice was that Indian tribal hous ing

projects should be on tribal trust land, and the Tribe sought to have a suitable site placed in trust. The Tribe's plan was made known to the City as early as March 1975. A. 477, 480.

In 1976 the Tribe tentatively selected the land now in controversy and arranged to have it conveyed to the United States in trust for the Tribe. A. 489 ¶ 11. The Tribe paid the purchase price, $1002. 2/

Title to the land was taken in trust for the Tribe in March 1977, and a HUD housing grant was made in September 1977. A. 490. But construction did not begin until the spring of 1981 owing in large measure to the City's opposition to the project. Id. This delay has been costly

2/ Unimproved land is not expensive in Sault Ste. Marie because it is plentiful. The City includes large undeveloped areas, and its population density is less than 1.7 persons per acre. A. 487-88 ¶ 4.

to the Tribe, because the grant that would have built 65 housing units then will now be enough for only 45. Controversy over the Tribe's plan had surfaced at least by October 1976. A. 481. See A. 776-83. The City filed the instant action in August 1977, [3] threatened to enforce its zoning laws to preclude the project, and refused to agree to provide water and sewer service to the housing site or to cooperate in other matters. A. 506.

In 1978 the United States filed an action in the District Court for Western Michigan, United States v. City of Sault Ste. Marie, No. M 78-33, alleging discrimination by the City. To settle that case the City and the United States submitted to a consent decree in 1979; it was also

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3/ We assume that the City's choice of the D.C. federal courts was an effort to avoid the Michigan federal court's decision in a closely-related case described in an opinion below. Pet. 14a-15a.

signed by the Tribe's housing authority. A. 511-32. The City agreed generally not to discriminate against Indians in providing municipal services and housing. A. 512. It also agreed to provide municipal services to the Tribe's planned housing project at rates comparable to those charged other residential users, A. 513, and to refrain from obstructing the project. A. 514. In return, the Tribe's housing authority agreed to comply with the City's applicable civil regulations. A. 531 ¶ 9.

In the courts below the City argued that the tax exempt status of tribal trust land would reduce its tax receipts, and the argument appears to be renewed here. 4/ The problem with this reasoning is that any HUD low income housing project of the kind the Tribe is building is tax exempt

4/ The issue may be getting undue attention, because taxes on the subject land averaged less than $100 per year prior to the trust acquisition. A. 490.

regardless of land status. 42 U.S.C. § 1437d(d). The project is required instead to make in lieu payments for municipal services. Id. See 24 C.F.R. pt. 811 (1981); A. 519 ¶ 3, 526 ¶ 3.

The City also argues that it is concerned about its land use, health, and sanitation jurisdiction over the parcel in question. This is hypocritical, since the Mar-Shunk district's health, sanitation, and safety have long been ignored by the City. A. 393-423. But again the difference in land status is much reduced by HUD statutes, which guarantee standards of quality and safety for HUD projects. 42 U.S.C. § 1437d(b); 24 C.F.R. subpt. 200 S (1981); 24 C.F.R. § 841.202-.203 (1981). Also (as stated above) the Tribe's housing authority agreed to comply with the City's building, safety, and sanitation codes, and it has done so.

SUMMARY OF ARGUMENT

1. There is no conflict between the decision below and that of any other Court of Appeals. The one conflict alleged is on an issue not reached by the Court of Appeals in this case, and the decision alleged to conflict may no longer represent the view of the other circuit.

There is no conflict between the decision below and any decision of this Court. The District Court correctly distinguished the purportedly conflicting decision. Also, the actual dispute over land use jurisdiction was settled in the final consent decree in United States v. City of Sault Ste. Marie, supra, in which the tribal housing authority agreed to observe the City's applicable civil regulations, such as building codes.

2. The Indian Reorganization Act sections involved give very broad dis-

cretion to the Secretary. Applicable precedents show that this authority has not been exceeded.

The Indian country issue was not reached by either court below. If it is reached by this Court, it should be decided against petitioner based on United States v. McGowan, 302 U.S. 535 (1938).

The courts below correctly concluded that petitioner's claim that due process required a formal hearing would place an intolerable administrative and fiscal burden on all levels of government, within the meaning of Mathews v. Eldridge, 424 U.S. 319 (1976).

ARGUMENT

I. THE DECISION ACCORDS WITH DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT

Contrary to petitioner's claim, there is no conflict between the decision below and that of any other Court of Appeals or

of this Court. In fact the principal issues have been decided consistently by other courts including this Court, as the opinions below demonstrate. Pet. 6a-8a, 14a-24a.

The only attempt petitioner makes to identify a conflict with another Court of Appeals is on the question whether petitioner City is a "person" within the Due Process Clause meaning. Pet. 18. This attempt fails for three reasons. First, the court below did not decide this issue against petitioner. The court summarily affirmed the District Court based on its opinion of August 29, 1980. Pet. 4a. The alleged conflict is only with the District Court's December 1980 opinion (Pet. 6a-8a) and was not reached by the Court of Appeals.

Second, the decision claimed to conflict may no longer reflect the law of the other circuit, as the District Court pointed

out. Pet. 7a-8a. Third, the District Court correctly followed an applicable decision of this Court. South Carolina v. Katzenbach, 383 U.S. 301 (1966). See Pet. 6a-8a. 5/

Petitioner's only specific allegation of a conflict between any ruling below and any decision of this Court is based on the District Court's denial of the City's claim of absolute land use jurisdiction over the tribal trust land. Pet. 21a-24a. This denial is said to conflict with Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), an argument rejected by the District Court. Pet. 24a. As that court noted, the state jurisdiction sustained in Mescalero was personal jurisdiction, not land use. On

5/ A distinct issue not presented here is whether a municipality acting in a proprietary capacity might be a fifth amendment "person" or whether the rule might be otherwise for purposes of the Takings Clause of the amendment. It is unclear whether South Carolina v. Katzenbach, supra, would control these situations.

the one land related issue in the case, the state tax was invalidated. Id.

Petitioner says that the Interior land use regulation sustained by the courts below, 25 C.F.R. § 1.4 (1981), lacks authority. This is not correct. Congressional policy has always committed Indian trust lands to Interior supervision and control. A relevant statute reflecting this policy is 25 U.S.C. § 231, first passed in 1929. It authorizes the Secretary to allow State inspection and enforcement of health, sanitation, and quarantine laws "upon Indian tribal lands, reservations, or allotments" (emphasis added). This statute by its terms is not limited to tribal lands within "reservations" and applies to the land at issue (as does 25 C.F.R. § 1.4). Congress implicitly viewed such State laws and authority as inapplicable without the statute. See also 25 U.S.C. §§ 81, 177, 202, 349, 372, 373, 396, 396a, 405, 407, 415

One potential problem with this issue is deciding whether a particular dispute is land related or personal, and hard cases can be imagined. But this is not one of them. As the record shows, the actual land use issue in this case arose from petitioner's attempt to use its zoning and building codes to prohibit the Tribe's housing project on trust land. The City had sought to frustrate the basic federal purpose for taking the land in trust. This issue was resolved by the consent decree in United States v. City of Sault Ste. Marie, supra, which includes the tribal housing authority's agreement to observe City regulations such as building codes. See pages 5-7 supra. There is no existing, concrete dispute, so petitioner necessarily presents this as an abstract question.

II. THE QUESTIONS ARE OTHERWISE INAPPROPRIATE FOR REVIEW

In this Court petitioner has shifted

its focus to the land use issue discussed above. In the courts below the focus was petitioner's assault on the acceptance of the land into trust under the Indian Reorganization Act, 25 U.S.C. §§ 465, 479. As the District Court's opinion recognizes, both of these sections involve broad administrative discretion. Section 465 authorizes the Secretary to acquire Indian trust land "in his discretion." Any review of this action is very doubtful, because the Administrative Procedure Act precludes review of agency action "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). And petitioner's challenge to tribal existence under section 479 is a question on which this Court has consistently deferred to the "political departments of the government whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same." United States

v. Holliday, 70 U.S.(3 Wall.) 407, 419 (1866).

Petitioner devotes many words to its fifth question, whether future occupancy of the Tribe's housing project may constitute the trust land area a dependent Indian community as the term is used in 18 U.S.C. § 1151(b). Pet. 22-27. Neither court below decided this question against petitioner, because the question seemed to the District Court not to be ripe for decision. An important reason is that actual tribal occupancy is an obvious condition for section 1151(b) to apply.

If the question is reached, the issue should be controlled by this Court's very similar decision in United States v. McGowan, 302 U.S. 535 (1938). The United States had bought a parcel of land on the outskirts of Reno, Nevada, and established the "Reno Indian Colony" for "needy Indians

scattered over the State of Nevada." Id. at 537. (The Colony is now within Reno's borders.) The purchase had been authorized under line item appropriations acts of 1916 and 1926. Id. This Court held the Colony to be a "dependent Indian community," and Congress relied on this decision in its 1948 codification of the term as section 1151(b) (as petitioner acknowledges, Pet. 23).

Since the 1948 enactment, section 1151(b) has been little used. Petitioner cites most of the reported cases (Pet. 22-23), and in some of them the statute was peripheral. More important for purposes of review, these decisions are consistent with each other and with this Court's McGowan opinion. They present no occasion for this Court's supervision.

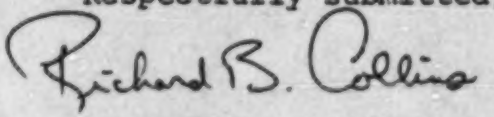
On petitioner's due process question, the courts below found that petitioner had notice and opportunity to tell the

Interior Department its views for a period of over a year. Petitioner claims that a formal hearing or the like is constitutionally required. The courts below recognized that any such rule would place an enormous burden on federal and state governments. Any property acquisition (real or personal) by a state or federal government affects the tax receipts and regulatory powers of the other under the federal system. A hearing in every case would be an intolerable "administrative and fiscal burden that the additional or substitute procedural requirement would entail." Pet. 19a, quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

CONCLUSION

For the reasons stated, the writ should be denied.

Respectfully submitted,



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Petitioner's Reply Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2090

CITY OF SAULT STE. MARIE, MICHIGAN,
Petitioner,

v.

JAMES G. WATT, *et al.*,

and

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

The Tribe's Brief in opposition is typical of the underhanded way the Respondents have consistently litigated this case. In what can only be characterized as a blatant attempt to portray the City as racially biased, the Tribe seriously and, we believe, intentionally misrepresents the motivations of the City in bringing this suit and mischaracterizes the actions taken by it prior to and during this litigation. Although these matters are plainly irrelevant to the issues presented, the City nevertheless believes that it should once again provide a complete picture of the underlying circumstances because of the serious practical implications.

The primary thrust of the Tribe's Brief is that the real purpose of this suit is to block the housing project involved. The record plainly indicates otherwise. From the

outset of the underlying controversy, the City has taken the official position that it is not opposed to the housing project.[1] See, e.g., Reply Brief of Appellant City of Sault Ste. Marie at 3-4 (D.C. Cir. No. 81-1189) and City Commission Minutes cited therein. Moreover, as evidenced by the Amended Complaint, the City has not sought relief which would prevent construction of the

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1. The City's initial refusal to extend water and sewer services to the proposed project until completion of the instant litigation was not inconsistent with its public stance. At least until the United States filed a Title VIII suit against the City in 1978 (United States v. City of Sault Ste. Marie, No. 78-33 (W.D. Mich)), the Tribe had officially represented to the City that funding for the housing project was contingent upon trust status. See, e.g., Reply Brief of Appellant City at 3 n.5 (D.C. Cir. No. 81-1189). The City, therefore, thought it was illogical and fiscally unwise to agree to extend water and sewer services before the resolution of the trust status issue in the instant suit; it also felt that such an agreement would be inconsistent with the position the City was taking in this action. See id. Once it was made clear during settlement negotiations in United States v. City of Sault Ste. Marie that funding of the project was not contingent upon trust status, the City felt that it could agree to extend water and sewer services to the project before final resolution of the instant case. A Consent Decree was thereupon entered into in that case (App. 511-32).

housing project (J.A. 13-21), nor could this suit have the effect of doing so, since funding of the project is not contingent upon trust status. See, e.g., Pet. at 3. Indeed, the project is now nearing completion. See id. at 3. What the City has been officially opposed to throughout this litigation though, is the removal of the tract involved from its jurisdiction to any extent - a matter of particular concern for the City in view of the fact that eighty-five units of housing are being constructed on the tract. See id.

In the same vein, the Tribe places considerable emphasis on a 1976 Report of the Michigan Civil Rights Advisory Committee - a Report which is not only outdated but which the Tribe knows to be seriously deficient in regard to the very charges of discrimination relied upon. As the City fully documented in the District Court, the Mar-Shunk area - the subject of that Report - is a very sparsely populated community in the

southeastern portion of the City. See, e.g., Reply Brief of Appellant City, supra, Add. 1 at 2. The number of people residing in this area in the late 1970's was approximately 240 (two percent of the City's population) - of which 64% (153) were of Native American descent. See id., Add. 1 at 2. Overall, there were approximately 1900 people of Native American descent residing withing the City at this time (twelve percent of the total population) with no significant concentration in any one area. See id., Add. 1 at 2.

As to housing in and the provision of services to this area in 1976, there is no question that the Mar-Shunk area was lacking in many City services and adequate housing, but this is by no means the whole picture of the situation as it existed in the City at that time. What the Advisory Committee Report ignored is that the services lacking in the Mar-Shunk area were also lacking in many other parts of the City, including the more affluent

areas. See, e.g., Reply Brief of Appellant City, supra, Add. 1 at 3-5. The Report also ignored the fact that the problem of substandard housing was not exclusive to this area of the City or to the Indian population of the City, but was in fact a city-wide problem.[2] See id., Add. 1 at 3. In brief, the Report wrongly characterized the situation in Mar-Shunk as the product of racial discrimination by the City.[3]

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2. In this regard, it ought to be mentioned that in 1976 the City was, through its own housing commission, operating ninety housing units for low income families and one hundred housing units for the elderly. See, e.g., Reply Brief of Appellant City, supra at 2.

3. The Tribe also makes reference to the settlement of the Fair Housing Act case previously discussed, United States v. City of Sault Ste. Marie. Here again, the impression the Tribe tries to leave is misleading. It is certainly true that to settle the case the City and the United States entered into a Consent Decree in 1979, but it is not true that that decree was signed by the Tribe's Housing Authority, nor could it have been, as the Authority was not a party to the case. In fact, neither the Tribe nor its Housing Authority were directly involved in the negotiations process.

Certain additions to the original Statement Of The Case are necessary in order to clarify matters raised in the Briefs in Opposition. The Respondents press various arguments respecting the significance of the Housing and Urban Development (HUD) Services Contract for the housing project (J.A. 525)[4] and the tax status of that project. Close examination of the applicable record, however, reveals that these matters are best characterized as a "smoke screen" intended to discourage review, since they do not, as the Respondents claim, minimize the controversy regarding the City's jurisdiction over the trust tract.

Taking the question of taxation first, although it is true that the City will receive

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4. HUD requires that an agreement for the provision of municpal services ordinarily provided without charge be obtained by the Housing Authority. In this instance, two were entered into: one which applies in the event the tract is properly held in trust - the Services Contract (J.A. 525); and one which applies in the event the tract is not properly held in trust - the Cooperation Agreement (J.A. 518).

payments in lieu of taxes for the housing project under the applicable HUD agreements (see n.4, supra), what it will receive will be less if the tract is held in trust than if it is not (J.A. 234, 255-56, 513, 707). Beyond that, these HUD agreements do not apply to those portions of the trust tract put to other uses by the Tribe (J.A. 518-19, 525-26).[5] In addition, prior to the execution of these agreements in 1979, no taxes were paid on the tract after it was taken in trust in 1977. So, although the agreements do lessen the loss of the power of taxation somewhat, they do not, as the Respondents suggest, completely allay the loss. See generally Nixon v. Fitzgerald, 50 U.S.L.W. 4797, 4800 (June 22, 1982).

In regard to the Services Contract (J.A. 525), the Tribal and Federal Respondents

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5. So far the Tribe has constructed a single story office building on the tract, and other portions of the tract are available for future development.

raise various claims regarding the significance of that agreement. The Tribe makes much ado about the provision in that contract in which it was agreed that the Housing Authority would comply with the City's applicable civil regulations (J.A. 531, ¶ 9), claiming that it effectively resolves the controversy over the applicability of the City's land use regulations to the tract. Viewed realistically, however, this provision is hardly the panacea the Respondents claim it to be. First, what is involved is a contractual provision which invests the City with only a contractual remedy - a remedy which is insufficient to ensure full compliance with all the City's codes. It does not, and certainly cannot, invest the City with the governmental authority - where it otherwise does not have it - to enforce its codes and the full means and remedies for enforcement available under that authority. The approach presently taken in

regard to the trust tract exemplifies these deficiencies. As a result of the holding of the lower courts that the City's land use regulations are inapplicable to the tract, the City is only issuing permits and conducting inspections on a contractual basis. Thus, although there is some cooperation going on as to some of the City's codes, construction has, for the most part, progressed on the trust tract without the type of City oversight and involvement as would normally be the case.

Second, and just as important, the agreement to comply with the City's civil regulations is binding only on the Housing Authority. It does not apply to the Tribe itself (see n.5, supra), or to the individuals who will reside or come on the trust tract.[6]

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6. In addition, the Tribe owns a forty acre tract near the trust tract on which it has constructed or will construct a tribal center, an office building, and recreational and related facilities. It is the Tribe's intention to seek trust status for this tract after the instant case runs its course.

This is significant because the City's land use regulations not only deal with construction related activities but with such things as property and housing maintenance, fire prevention, and garbage and sewerage disposal (J.A. 257).[7]

Taking a different approach, the Federal Respondents assert that in view of the provision in the Services Contract which obligates the City to grant, in certain limited circumstances, deviations from its building and zoning codes (J.A. 528-29), the concerns

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7. The following City codes and regulations are also implicated here: Air Pollution Prevention and Control (City Code § 4-1 et seq.); Amusements (City Code, Chapter 6); Keeping of Animals and Fowl (City Code, Chapter 7); Litter (City Code § 13-38 et seq.); Junk (City Code, § 13-63 et seq.); Mobile Homes (City Code, Chapter 17); Nuisance and Noise Abatement (City Code, Chapter 18); Signs (City Code, § 20-57 et seq.); Obstructions and Encroachments (City Code § 22-34 et seq.); and Trees, Shrubs and Plants (City Code § 25-16 et seq.). Overall, some twenty separate codes and regulations of the City are potentially involved. It should be noted here that all of these land use regulations, whether construction related or not, are designed for the health, safety, and welfare of the City's residents and are of continuing applicability (J.A. 257).

of the City in the land use context are insubstantial. An examination of that provision, however, reveals the contrary. First, as the District Court recognized (Pet. App. at 22a), this provision waives applicability of only two - and only in certain circumstances - of a number of codes and regulations which would be applicable on the tract. See discussion, supra, at 10. Moreover, this provision presupposes the very matter at issue here - that the City has the authority to enforce the two codes on the tract. Thus, if the ruling of the lower court is left standing, there will be no need to seek or grant deviations since the two codes will continue to be without force and effect on the trust tract.[8]

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8. The claim is also made by the Tribe that the difference in land status is much reduced by HUD statutes and regulations. What this claim ignores is that the applicable statutes and regulations deal only with site selection and construction. As stated above, the City's regulations deal not only with construction but with a myriad of other matters pertaining to the use and maintenance of property. See n.7, supra. Beyond that, the HUD regulations

ARGUMENT

I. APPLICABILITY OF STATE AND LOCAL LAND USE REGULATION TO OFF-RESERVATION § 5 TRUST LAND

It is the Tribe's position that since the Housing Authority has agreed to comply with the City's civil regulations, there is no existing concrete dispute. As the previous discussion demonstrates, this agreement does not at all alleviate the problems created by the ruling of the lower court. Moreover, the Tribe's assertion here misapprehends the basic thrust of the City's case as to this issue. The focal point is the long standing policy of the Department of the Interior, as implemented by 25 C.F.R. § 1.4 (1981) (Pet. App. 41a), that off-reservation trust land is exempt from all state and local land use regulation - a policy which both the Tribe

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(cont.)
themselves contemplate that each housing project will comply with "applicable state and local laws, codes, ordinances, and regulations." 42 C.F.R. § 841.107(c)(2). It is evident then, that the HUD statutes and regulations hardly remedy the problems presented by the ruling of the lower court.

and the United States have consistently claimed governs the tract at issue here (J.A. 232-33, ¶¶ 29, 30, and 33). This then is the dispute - the applicability of this blanket exemption to the trust tract at issue, a dispute which has an immediate and direct impact on the authority of the City. This controversy is fully defined and the underlying issues are purely legal. Therefore, as both the District Court and the Court of Appeals held, the land use issue is ripe for judicial resolution. See, e.g., Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49, 152-53 (1967). See generally Clements v. Fashing, 50 U.S.L.W. 4869, 4870-71 (June 25, 1982); Blum v. Yaretsky, 50 U.S.L.W. 4859, 4861 (June 25, 1982); Edgar v. MITE Corp., 50 U.S.L.W. 4767, 4768 (June 23, 1982).

Equally without merit is the Federal Respondents' claim that the regulations governing trust acquisitions, 25 C.F.R. § 1.4(b) (Pet. App. at 42a), offer a

sufficient accommodation of state and local interests in this context. True, the new acquisition regulations require consideration of the tax consequences and jurisdictional impact of a proposed acquisition - an improvement over previous policies, but they offer no guidelines as to when those concerns should require rejection of an application. Therefore, because the decision whether to accept additional land in trust is essentially discretionary and because trust land acquisition is one of the fundamental aspects of the federal government's trust relationship with its Indian wards, it is unlikely that state and local interests will, or even can, be adequately accommodated. This is particularly true since the only mechanism available under these regulations for resolving the concerns and conflicts in this respect is rejection of the application for trust status.

Nor is 25 C.F.R. § 1.4(b) a realistic means of accommodating state and local jurisdictional concerns. First, there is nothing in this provision which compels the Secretary to adopt any of the regulations at issue; to the contrary, all that is provided is that the Secretary has the discretion to do so to the extent it is determined to be "in the best interest of the Indian owner or owners. . . " - hardly a guarantee that state and local interests will be fairly accommodated. And second, to the extent an adoption is made, it is the Department of the Interior, and not the state or locality, which is responsible for implementation and enforcement, as § 1.4(b) does not - and certainly cannot - vest the state and local authorities with governmental jurisdiction over an area where, under federal law, they have none.

Finally, the Federal Respondents erroneously suggest that whenever Congress authorizes acquisition of federal property

for whatever purpose, it intends that only the federal government will govern the use thereof including the nature of the structures erected thereon. This may well be true where the project is constructed by the government itself and operated as an instrumentality. However, where, as in the instant case, the project at issue is not a government instrumentality (see, e.g., Mescalero Apache Tribe v. Jones, 411 U.S. 145, 150-53 (1973); James v. Valtierra, 402 U.S. 137, 138-40 (1971)), different considerations obtain. In this situation, the focus is on whether enforcement of state and local law is preempted by federal statute or duly authorized regulation. See, e.g., Fidelity Federal Savings & Loan Assoc. v. De La Cuesta, 50 U.S.L.W. 4916, 4919 (June 28, 1982); Mescalero Apache Tribe v. Jones, supra, 411 U.S. at 148-49. In the instant case, 25 C.F.R. § 1.4(a) unquestionably pre-empts the application of all state and local land use regulation to the trust

tract at issue. The question to be resolved then, is whether § 1.4(a) is properly applicable to off-reservation trust land acquired pursuant to § 5 of the Indian Reorganization Act, 25 U.S.C. § 465 (see, e.g., Fidelity Federal Savings, supra, 50 U.S.L.W. at 4919, 4921) - the very issue presented by the City's Petition.

II. THE QUESTION OF WHETHER THE 76-ACRE TRUST TRACT IS "INDIAN COUNTRY" WITHIN THE MEANING OF 18 U.S.C. § 1151 IS PROPERLY BEFORE THE COURT FOR REVIEW

The Federal Respondents incorrectly claim that the issue of whether the 76-acre trust tract is "Indian Country" within the meaning of 18 U.S.C. § 1151 (Pet. App. at 41a), is not properly presented for review. Brief in Opposition at 20 n.10. Throughout this litigation the City has, in claiming that the trust tract is not "Indian Country", argued - albeit unsuccessfully - that the issue of whether the tract is a dependent Indian community within the meaning of

§ 1151(b) can be resolved on the basis of the present record, and without the need of a factual inquiry as to the nature of the housing project. Pet. at 5, 25. Therefore, this issue was properly preserved for presentation to this Court. The issue of whether the tract is an Indian reservation within the meaning of § 1151(a) is probably properly before the Court as well. Although this issue might not be properly invoked in this context (see Pet. at 5, 22 n.22, 26), it may nevertheless be significant in the land use context. See, e.g., Massachusetts Mutual Life Insurance Co. v. Ludwig, 426 U.S. 479, 480-81 (1976). See also Singleton v. Wulff, 428 U.S. 106, 120-21 (1976).

In regard to the substantive issues, the United States, in the context of a similar case pending before this Court (Brief For The Respondent In Opposition at 6-7, State of South Dakota v. United States, No. 81-1910), acknowledges that the term "dependent Indian

communities" as used in § 1151(b) is derived from the decisions in United States v. Sandoval, 231 U.S. 28 (1913) and United States v. McGowan, 302 U.S. 535 (1937), and the First Circuit has recently so held. United States v. Levesque, No. 80-1749, slip op. at 3-4 (1st Cir. June 22, 1982). Given this, it follows that the scope of § 1151(b) can be determined only with reference to these cases (Pet. at 23) - something which the lower courts have failed to adequately do by relying too strictly on United States v. Martine, 442 F.2d 1022 (10th Cir. 1971), the first published decision to consider this provision. See Pet. at 24-25.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition and the supporting Amici briefs, the Petiton for Writ of Certiorari should be granted.

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-2090

CITY OF SAULT STE. MARIE, MICHIGAN,
Petitioner,

v.

JAMES G. WATT, et al.,

and

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for
the District of Columbia Circuit

BRIEF OF THE COUNTIES OF BENNETT, CHARLES MIX, CORSON, DEWEY, JACKSON, AND ZIEBACH, SOUTH DAKOTA, AND THE COUNTIES OF DUCHESNE AND UINTAH, UTAH AS AMICI CURIAE IN SUPPORT OF PETITION

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BRIEF OF THE COUNTIES OF BENNETT, CHARLES MIX, CORSON, DEWEY, JACKSON, AND ZIEBACH, SOUTH DAKOTA, AND THE COUNTIES OF DUCHESNE AND UINTAH, UTAH AS AMICI CURIAE IN SUPPORT OF PETITION

Interest of Amici Curiae

The Counties joining herein have submitted this brief in order to express their interest in the issues raised by the City of Sault Ste. Marie in its Petition for Writ of Certiorari and to urge that the Petition be granted. As a basic proposition, the final resolution of this case will have the greatest impact on local governments, since they are generally responsible for implementing state and local law on a day-to-day basis.

The Amici joining herein have a strong interest in the manner in which any question of federal Indian law affecting them is resolved. In regard to the instant case, the continuing acquisition of trust land for individual Indians and tribes has created serious jurisdictional problems - both as to taxation and otherwise - for counties in which those lands are located. Each of the Amici Counties has trust lands located within its boundaries. Therefore, the Amici are submitting this brief in order to stress the importance of the instant case.

Argument

As the Petition indicates, the continuing acquisition of trust lands by the Federal Government for the use of Indians and Indian tribes creates serious problems for the Counties and other local governments in which those lands are located. Under 25 U.S.C. § 465, the acquisition

of land pursuant to that section has the effect of removing that land from the property tax rolls of the county or other taxing entity. Moreover, as the issues in this case suggest, there is a serious question as to whether land taken in trust outside of a reservation is also removed from other aspects of local jurisdiction.[1] Thus, the acquisition of trust land can have significant consequences for the local governments in those areas where such lands are acquired. The Amici Counties already contain considerable amounts of Indian trust land within their boundaries (see, e.g., Bureau of Indian Affairs - Office of Trust Responsibilities, Annual Report of Indian Lands at 43-72 (1980) [Acreage Recapitulation

---

1. Both on-reservation and off-reservation trust lands are included within the boundaries of the Amici Counties. For those lands presently within existing Indian reservations, the jurisdiction of the States and Counties is already significantly diminished and the principal effect of trust status is on taxation. See, e.g., DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). On the other hand, in Counties such as Bennett County, South Dakota, which lie outside of an existing reservation, lands subject to future acquisition are ordinarily under the complete jurisdiction of the States and Counties, and the jurisdictional effect of acquisition in trust is therefore potentially quite severe, depending in part on the determination of the questions raised by this case.

by County]), and additional acquisitions continue to be proposed.[2]

In sum, the issues presented by the Petition for Writ of Certiorari are of paramount concern to the Amici. The Counties share the concerns of the City of Sault Ste. Marie regarding these issues, and adopt the arguments stated therein.

Conclusion

For the reasons stated above and in the Petition, the Amici Counties respectfully urge that certiorari be granted in order to resolve the important questions presented by this case.

Respectfully submitted,

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2. For example, within Dewey County, South Dakota, there are presently about 840,100 acres of trust land comprising 55.8% of the total land area of the County. A recent federal proposal anticipates the acquisition in trust of an additional 6,866 acres, thereby further depleting the County's tax revenues by $7,460 annually and reducing the amount of taxable land by one percent (1%).

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES AND THE UTAH ASSOCIATION OF COUNTIES, et al., AS AMICI CURIAE IN SUPPORT OF PETITION

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The following State Associations of Counties also join in the views expressed herein:

Colorado Counties, Inc.
Idaho Association of Counties
Montana Association of Counties
South Dakota Association of County Commissioners
Washington State Association of Counties

Certain other interested State Associations did not have an opportunity to fully examine the merits of the question presented prior to the printing of this Brief. The Office of the Clerk will be advised directly if those Associations elect to join in the views expressed herein.

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES AND THE UTAH ASSOCIATION OF COUNTIES, et al., AS AMICI CURIAE IN SUPPORT OF PETITION

INTEREST OF THE AMICI

The County Associations joining herein are submitting this brief in order to express their interest in the issues raised in the Petition for Writ of Certiorari filed in this case and to urge that the Petition be granted. As provided for in Rule 36.1 of this Court, all the parties have consented to the filing of this brief.

The National Association of Counties (NACo) and the various State Associations of Counties joining herein, have decided to participate as Amici - an action they rarely take - because of the particular significance this case has for their membership.[1] In the context of trust land acquisition, the Amici Associations are highly concerned about the following: (1) the erosion of the local tax base when land goes into Indian trust status; and (2) the loss of local government police powers over non-reservation trust land and the resulting impact on protecting the general welfare and providing services. The Amici are also particularly interested in the resolution of the Due Process issue because of its broad implications for all their membership. Thus, they believe that the Court should consider whether local governments have a right to the protection of Due Process under the

---

1. Numerous members of the Amici Associations have either on- or off-reservation trust lands or both located within their boundaries.

Fifth Amendment when federal action results in the loss of taxation and other governmental powers.

ARGUMENT

The National Association of Counties and the Amici State Associations - affiliates of NACo - have taken an active interest in the problems of Indian trust land acquisition. In response to this concern, NACo adopted the following resolution in 1981:

> WHEREAS, NACo is concerned about conversion of land into Indian trust status;
>
> THEREFORE, BE IT RESOLVED, that members of Congress be petitioned to request the secretary of interior to place an immediate moratorium on further conversion of land into Indian trust status. The moratorium would remain in place until congressional hearings could be held to establish what the policy of the United States is with regard to these conversions, in light of the threat to the provision of basic services by counties affected by the removal of these lands from their tax rolls.

National Association of Counties, American County Platform and Resolutions, 1981-1982 at 214 (Resolution 10H). Furthermore, the Western Interstate Region of NACo - the Region most intimately concerned with this problem and in which the Amici State Associations are located - has recently adopted a resolution (App. at 1a-2a) in which concern was expressed respecting the continued acquisition of trust land off-reservation and the removal therefrom from county jurisdiction. These two resolutions then, are reflective of a continuing concern among the County Associations regarding trust land acquisition and the attendant jurisdictional problems.

Moreover, the Department of the Interior itself has recently acknowledged that trust land acquisition under § 465 has created considerable controversy. See App. at 3a-6a. In this regard, the Deputy Assistant Secretary of the Interior for Indian Affairs stated in an August, 1981 letter that "acquisition of trust lands pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, has been and continues to be an extremely heated political issue. . . ." App. at 3a (emphasis added). There can be no question then, that it is widely recognized that the Department's expanded use of § 465 in recent years has caused and will continue to cause considerable concern, at least until a definitive resolution of the issues presented by this case is provided by this Court.

In summary, the Amici Associations support the City's petition for a writ of certiorari, and concur in the arguments articulated therein.

CONCLUSION

For the reasons stated above, the Amici County Associations urge that the petition be granted.

Respectfully submitted,

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APPENDIX

Resolution on Indian Affairs requesting NACo Public Lands to investigate Bureau of Indian Affairs Land Acquisition Policy.

WHEREAS, Recent activities by the Bureau of Indian Affairs and various Indian tribes have created new or expanded reservations; and,

WHEREAS, The Bureau of Indian Affairs has created new reservations apparently without the consultation procedures as required by regulation; and,

WHEREAS, Land has been purchased outside of established reservations that tribes are now claiming to be Indian trust lands and therefore removed from county jurisdiction; and,

WHEREAS, Land has been purchased by individual tribal members off of reservations and deeded to the tribe for the purpose of those lands becoming trust lands; and,

WHEREAS, The NACo policy on new Indian trust lands (Sec. 10.2.3) calls for compensation to county governments for lost revenue;

NOW, THEREFORE, BE IT RESOLVED, That the Washington State Association of Counties petition the Western Interstate Region to request the NACo Public Lands Research Team to prepare a detailed report on Indian reservation establishment, and the purchase of additional Indian trust lands. Such report shall contain specific proposals to assure a strong county role in

reviewing and approving the creation of new or expanded Indian reservations and trust lands.

ADOPTED by the Executive Committee of the Washington State Association of Counties this 18th day of March, 1982

/s/ James T. Henning
President

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Aug. 81

Dear Chairman Billie:

I have prepared this letter and requested that the Area Director of the Eastern Area Office personally deliver it to you on my behalf. Representatives of the State of Florida have met with officials of this Department and called to our attention a situation that could have adverse impacts not only on the Seminole Tribe but could generate repercussions that would impact the interests of other tribes as well. I am referring to the opening of a smokeshop on land near the City of Tampa that the Department accepted in trust status on January 16 of this year.

The acquisition of trust lands pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. 465, has been and continues to be an extremely heated political issue. Because of challenges to the Secretary's authority to accept lands in trust for tribes, and being aware that Congress could easily terminate such authority, the Department spent almost two years drafting, holding hearings and getting final approval of land acquisition regulations. These regulations became final on October 20, 1980.

When the tribe initially approached the Department with its request that land in Tallahassee and Tampa be accepted in trust, the tribe was advised that the Tallahassee parcel would not be considered for trust acquisition but that we would consider the Tampa site for acceptance if the tribe could demonstrate that the acquisition was necessary to safeguard Seminole cultural sites in the Tampa area. Based on endorsemnts from Senators Chiles and Stone and Representatives Gibbons and Fuqua supporting the acquisition for purposes of preserving artifacts and the possible construction of a museum, and based on representations from the tribe that it intended to be a good neighbor to the City of Tampa, use the land primarily for reinterring remains, the construction of a museum and related activities, and the construction of housing for tribal employees, the Department reconsidered the tribe's request for trust acquisition.

In reliance upon the support of the Florida congressional delegation, (which, it must be reemphasized, was limited to use of the land as a burial site and museum) the City of Tampa's support, and the tribe's representations, the Department took, on the tribe's behalf, an extraordinary action and waived the provisions of our land acquisition regulations, 25 CFR 120a. When the entire scenario surrounding this acquisition is reviewed, it appears that

the tribe failed, if not by design, at least by omission, to reveal its true intentions for the use of this property. The Department's communications with members of Congress and local state officials and its decision to accept the land in trust were predicated on the unique cultural aspects of the Tampa archaeological finds and not as a haven for the tribe to conduct smokeshop operations (or bingo) on a tract of trust land far removed from the tribe's existing reservation.

Because of the furor the tribe's activities on this land has caused and because it could have adverse impacts on the Department's ability to acquire trust lands for other tribes, I feel compelled to advise you of the possible ramifications of the tribe's actions. First, Congress could curtail or eliminate the Secretary's broad authority to acquire additional trust lands. It could also either remove the Tampa parcel from trust status or set limits for its use. In addition, it is our understanding that the tribe's ability to sell untaxed cigarettes is based on a state law. The next session of the State Legislature begins in January and there is little doubt that the cigarette tax issue will be discussed. The tribe should carefully assess its position, in light of the Supreme Court's recent decision in Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980), if the state law is repealed or modified and with the understanding that although the Tampa parcel is in trust it is not part of the Seminole Reservation.

In short, I request that the tribe carefully consider the possible impacts of its actions in Tampa, not only for adverse effects on the Seminole Tribe but for possible effects on other tribes who are seeking additional trust lands; and I request that the tribe bring its activities in Tampa in line with the original purpose for which the land was accepted in trust.

Sincerely,

Deputy Assistant Secretary - Indian Affairs

Amicus Brief

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SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,

Respondents.

BRIEF FOR THE STATES OF SOUTH DAKOTA AND MINNESOTA, AS AMICI CURIAE IN SUPPORT OF PETITION

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BRIEF FOR THE STATES OF SOUTH DAKOTA AND MINNESOTA, AS AMICI CURIAE IN SUPPORT OF PETITION

INTEREST OF AMICI CURIAE STATES

The States of South Dakota and Minnesota have a substantial interest in the issues raised by the

City of Sault Ste. Marie in its Petition for Writ of Certiorari. This case raises important issues concerning the acquisition of land in trust for Indians and Indian tribes by the United States under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 et seq. Because the Amici States have substantial Indian populations, the federal programs of acquiring trust land for Indians has had, and continues to have a significant effect within these States.[1]

ARGUMENT

As is fully discussed in the Petition, the acquisition of land in trust results in the exemption of the land from all real property related taxation by the States and their local governmental subdivisions (25 U.S.C. § 465), and may also greatly reduce the

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[1] The State of South Dakota, for example, already contains over five million acres of Indian trust land within its boundaries. See Bureau of Indian Affairs, Annual Report of Indian Lands at 7 (1980). This trust land constitutes over 10% of the total land area of the State. Moreover, between 1969 and 1980, there has been a net addition of some 386,000 acres to the amount of trust land in the State.

jurisdiction of the State and local governments in other contexts. Therfore, both the manner in which trust land is acquired, and its jurisdictional status following the acquisition in trust are matters of major concern to the Amici States.[2] The issues raised in the Petition have broad implications of a national scope and are in urgent need of resolution by this Court.

The Amici States concur in the arguments advanced by the City of Sault Ste. Marie in the Petition for Writ of Certiorari, and agree that the decisions of the Court of Appeals and the District Court in the instant case were incorrectly decided and, if left standing, will have serious and unwarranted consequences in the area of Indian law. The Amici Curiae, therefore, support the Petition for

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[2] For example, in State of South Dakota v. United States, Supreme Court No. 81-1910, South Dakota is seeking review of a decision of the Eighth Circuit of some of the issues presented in this case.

Certiorari, and adopt the arguments articulated therein.

CONCLUSION

For the foregoing reason the Amici Curiae urge that certiorari be granted.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICI CURIAE STATES OF WASHINGTON, ARIZONA, CALIFORNIA, FLORIDA, HAWAII, IDAHO, MONTANA, NEVADA, NORTH DAKOTA, OKLAHOMA, UTAH and WYOMING

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QUESTION PRESENTED

May the Secretary of the Interior, absent express Congressional authority to do so, diminish or extinguish a state's regulatory jurisdiction over a parcel of land, located outside the boundaries of any Indian reservation, merely by accepting that land into trust pursuant to § 5 of the IRA of 1934, 25 U.S.C. § 465?

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BRIEF OF AMICI CURIAE STATES OF WASHINGTON, ARIZONA, CALIFORNIA, FLORIDA, HAWAII, IDAHO, MONTANA, NEVADA, NORTH DAKOTA, OKLAHOMA, UTAH and WYOMING

STATEMENT OF INTEREST OF AMICI

Twenty-three federally-recognized Indian reservations exist within the State of Washington. Much of the land on these reservations has passed into non-Indian ownership, pursuant to the federal policy embodied in

various allotment acts, including the General Allotment Act of 1887 (24 Stat. 388). In Washington, statewide, the non-Indian reservation population exceeds 58,000 people, while the Indian population is approximately 14,000.

In recent years the Secretary of the Interior, acting pursuant to § 5 of the Indian Reorganization Act of 1934, 25 U.S.C. 465, has accepted into trust status many parcels of land, both within and without the exterior boundaries of established Indian reservations, as well as land with no connection whatsoever to an established reservation, for bands or communities of Indians hitherto unrecognized as tribes, with no established and recognized reservation.

On certain of the parcels described above, commercial activities are currently taking place, under circumstances where it is claimed, at least, to be beyond the jurisdiction and control of the State of Washington and its various municipal corporations. This activity includes gambling under circumstances unlicensed by the State, and the sale of liquor both to tribal members and non-Indians, again not taxed or licensed by the State of Washington.

Similar circumstances, or the potential therefor, exist in each of the other amici states.

The Amici States' interest is thus twofold. Besides the interest in avoiding, where possible, the "pervasive federal jurisdiction" complained of in the Petition for Certiorari, it is in the States' paramount interest to avoid the ouster of their own jurisdiction over their own land, and citizens, and thus, in effect, the diminishment of their own territory. We thus address only what is in essence a combination of questions presented as Nos. 1 and 5 of the Petition for Certiorari, and do not address, nor take any position on, questions presented in Nos. 2, 3 and 4.

REASONS FOR GRANTING THE WRIT

I. The Question Presented Is Of Nationwide Importance.

The significance of the fundamental question involved in this litigation, and its nationwide scope, are perhaps best illustrated by the extent of litigation arising out of the Secretary of the Interior's exercise of his power, pursuant to § 5 of the IRA, 25 U.S.C. § 465, and of his concomittant administrative declaration, pursuant to 25 C.F.R. § 1.4, that the land thus accepted into trust status is to be free and exempt from all state and local governmental regulation and control. In addition to the case at bar see, for example, *United States v. South Dakota*, 665 F.2d 837 (Eighth Cir., 1981), Petition of Certiorari filed March 8, 1982, No. 81-1910; *United States v. Mound*, 477 F.Supp. 156 (D.C.S.D., 1979); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (Ninth Cir., 1975), cert. den. 429 U.S. 1038 (1977); *Chase v. McMasters*, 573 F.2d 1011 (Eighth Cir., 1978), cert. den. 439 U.S. 965 (1978); *City of Tacoma v. Andrus*, 457 F.Supp. 342 (D.C.D.C., 1978).

Litigation over this issue, in one respect or another, will (we suggest) continue until this Court finally settles the fundamental question which we have here framed.

At the outset we should note that we are not here addressing the shrinking of a state and local government's tax base as a result of taking land into trust. Even in light of the overwhelming revenue problems facing the states today, the loss of a portion of the real property tax base is not our major concern. Although often involving unfairness, lost revenue can always be made up by collecting more taxes from those who are subject to the State's taxing power. Loss of jurisdiction or sovereignty, on the other hand, (including, in many cases, the jurisdiction to tax commercial activities conducted on the land), cannot be made up by being more sovereign over the land remaining. Lack of control over a major industrial facility cannot be corrected by asserting more environmental control elsewhere.

It is perhaps by now obvious that we approach this question somewhat differently than Petitioners, and perhaps from other litigants in the past. We submit that when analyzed from the perspective we suggest the scope of the problem, and thus the need for its resolution by this Court, becomes clear.

The problem is not just the "pervasive federal jurisdiction" which Petitioners point out. That is concern enough, but it is not something which is novel or unfamiliar, at least to the western states. Indeed, even on Indian trust land, much *federal* jurisdiction is *concurrent* with that of the state. The real problem is the ouster of the state's (as well as its municipalities') jurisdiction—in favor of Indian tribal jurisdiction—over its own land and citizens. The true question then, the issue of national significance, is not just whether or not the Secretary may accept a certain parcel of land into trust. The question is *the effect* of such a trust designation by the Secretary; *i.e.*, the validity, if you will, of 25 C.F.R. § 1.4 and of the whole notion of "instant reservation" status for such newly acquired trust land. Can the Secretary of the Interior, by more administrative action, diminish the territorial jurisdiction of a state?[1]

Can he, in effect, reduce the geographic boundaries of a state by carving out pockets of land, large or small, over which the state's sovereign power and jurisdiction will be diminished, if not, for some purposes at least, altogether extinguished? See *Bryan v. Itasca County*, 426 U.S. 373 (1976). We think the answer to these questions is no.

Our concern in this area stems not just from the facts of this or similar acceptances by the Secretary of land into trust, with the consequent invocation, of 25 C.F.R. § 1.4 by the Indians concerned and the federal government. Rather, it is heightened by the treatment, in recent decisions of this Court, of the concept of "inherent tribal

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[1]The more fundamental question, can even Congress do so, at least without the consent of the affected state, is not this lawsuit. The Court will not, of course, take on that more difficult question by granting certiorari in this case.

sovereignty," coupled with the potential for real inequity and unfairness involved with the application of the doctrine of tribal immunity.

Simply stated, we see (or perhaps fear) in recent statements found in *Merrion v. Jicarilla Apache Tribe*, ___ U.S. ___ (1982) and the concluding paragraphs of *Montana v. United States*, 450 U.S. 544 (1981) an apparent departure from earlier statements that "inherent tribal sovereignty" is limited to tribal self-government—to the internal affairs of the tribes—found consistently in the cases beginning with *Fletcher v. Peck*, 6 Cranch 87 (1810). See, *e.g.*, *Johnson v. M'Intosh*, 8 Wheat 543 (1823); *U.S. v. Kagama*, 118 U.S. 375 (1886); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *United States v. Wheeler*, 435 U.S. 313, 326 (1978); *Montana v. United States, supra*, at 564. See also *Merrion, supra*.

The point we are making is simply this: If an Indian tribe's relations with, and, in some cases at least, governmental power over, the activities of non-members is to be based upon "inherent tribal sovereignty," rather than Congressionally delegated authority (see *United States v. Mazurie*, 419 U.S. 544 (1975)) then the authority of the Secretary to create such sovereign enclaves, virtually by the stroke of a pen, should be closely scrutinized by this Court. For the coupling of this apparent expansion of the doctrine of inherent tribal sovereignty, and its extension to relations with non-Indians and, presumably, the states—with the already significant exemptions from state and local jurisdiction which *reservation* trust lands enjoy—becomes all the more alarming. If Indian tribes are to exercise and enjoy such broad independence from the traditional governmental controls which others in this nation are subject to, the creation of such jurisdictional islands without express and postivite action by the Congress is a matter of serious national concern.[2]

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[2]Not only, we submit, should the court, in clarifying the scope of § 5 of the IRA, 25 U.S.C. § 465, make it clear that no alteration whatsoever in the jurisdiction status of such newly acquired trust land occur without express Congressional authority. It should also clarify the

A further concern, and a further reason to grant certiorari in this case, is the operation of the doctrine of tribal immunity. If the lower court's view prevails, the housing facilities on the land here involved will be free from all state and local land use controls. The state and local building, fire safety and electrical codes are to be inapplicable. Thus the traditional means which guests and occupants alike have come to rely on to ensure safe and habitable dwellings will be either unavailable, or available only to the extent desired by the Tribe.[3]

If, as we presumed from the record available to us, the facility is to be operated by a Tribal Housing Authority, then tribal immunity will most likely be sure to render even wider and deeper the jurisdictional island within the State of Michigan which the Secretary has created. Unless the scope of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) is limited, as we think it ought, to its particular facts and no more, then how is any self-imposed building code be enforced against the Housing Authority if it is immune from suit in either federal or state courts?[4] How is one injured while upon this land to be made whole, without access to the courts?

Again, we submit that because of the potential significance of the operation of tribal immunity upon Indians and non-Indians alike while upon this land (or while doing business with the Tribal Housing Authority) this case merits plenary review by this Court.

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holding in *Marion* and dictum in *Montana*, making clear that any tribal governmental and regulatory power over non-Indians can only come from specific Congressional delegation of such authority. See *U.S. v. Mazurie, supra.*

[3]As well, we suppose, as desired by the Department of Housing and Urban Development and imposed through the inclusion of conditioning funding authority.

[4]Nothing in the opinions below indicates that this particular Tribe of Chippewas is even possessed of a Tribal Court which might arguably, at least, have jurisdiction over the Authority.

II. The Issue Is Unsettled.

Contrary to the view taken by the lower courts (as well, we are sure, by the respondents) this is not a question of settled law. In fact, the case which comes as close as any to settling the issue, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), answers the question, we submit, in favor of the City of Sault Ste. Marie.

The District Court, and the Court of Appeals in affirming without opinion, relied exclusively on *Santa Rosa Band of Indians v. King's County*, 532 F.2d 655 (Ninth Cir., 1975). That case, however, is not an expression of the state of the law *by this Court*, and thus should not be viewed as finally settling this highly significant question.

Of equal importance, the land involved in *Santa Rosa* was, in fact, *within the boundaries of an established Indian reservation.* It was not, as is the land involved in the case at bar, land hitherto totally unconnected with any established Indian reservation whatsoever. Finally, the *Santa Rosa's* Court's analysis of the problem was superficial at best. The Court there said:

> "We think 25 U.S.C. § 465, which authorizes the Secretary to purchase land for the 'purpose of providing land for Indians' and to take the title to such lands in trust, when read against the history of Indian policy governing use and control of Indian trust property, is sufficient to sustain the regulation * * *" 532 F.2d 655, 665-666.

It is simply not sufficient to end the analysis at that point. In order to insulate completely such land from the jurisdiction and control of the State of Michigan and its established governmental units *express Congressional authority should be found*—and not just a history of federal policy as the Ninth Circuit thought.

That express Congressional authority cannot, we submit, be found from the language of 25 U.S.C. § 465 itself. A reading of that section clearly indicates no independent and express authority for the proposition that merely accepting land into trust status will remove it

entirely from the jurisdiction and control of a state, or that the Secretary would have the rulemaking authority to so provide by himself. The commentators who have examined that section and the Secretary's regulation, 25 C.F.R. § 1.4, find no Congressional authority for promulgation of that regulation. See Price, Law and the American Indian (1973); Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 U.C.L.A. Law Review 535, 586 Note 229 (1975).

An examination of the legislative history of the Indian Reorganization Act, and particularly § 5 thereof (now codified as 25 U.S.C. § 465) provides no support for the expanded reading of that section, or for the validity of 25 C.F.R. § 1.4. See 78 Cong. Rec. 11125-132; H.R. Rep. No. 1804, 73rd Cong., 2nd Sess., 6 (1934); S. Rep. No. 1080, 73rd Cong., 2nd Sess. 1 (1934). Indeed, we believe the better view of its legislative history supports the proposition that § 465 was intended solely to authorize the Secretary to acquire land in trust status for qualifying Indians or Indian tribes, and to specifically exempt that land from the imposition of real property taxes. That section should not be read to support the claim of total exemption from state and local control and jurisdiction, or the granting by Congress, almost sub silentio, of authority to the Secretary of Interior to provide such an exemption by administrative regulation.

Finally, we do not think that this Court will, as the District Court essentially did, give the back of its hand to *Mescalero Apache Tribe v. Jones, supra.* That case should indeed support the city's position here. And the apparent inconsistency between the lower court's treatment of this issue and the *Mescalero* Court's analysis, together with the casual consideration given that case in the courts below, should now prompt the full review of the issue by this Court.

The Court in *Mescalero* said:

> "* * * Absent express federal law to the contrary, Indians *going beyond reservation boundaries* have generally been held subject to nondiscriminatory

state law otherwise applicable to all citizens of the State * * *" 411 U.S. 145, 148-149. (Emphasis supplied)

The critical similarity between this case and *Mescalero* then, as well as the critical distinction from *Santa Rosa*, is the lack of reservation status. This land is unconnected with *any* reservation, and the Secretary has not taken the even more significant step for the executive branch, that of granting it such status under § 7 of the IRA, 25 U.S.C. § 467. *Mescalero* teaches us then that *reservation* status is the real touchstone. Without the shield of that status, even that land is not totally beyond the reach of the state's powers.[5]

Again, posing the problem in the form of a question, can the Secretary of the Interior effectively exempt Indians and Indian activities (including, we suggest, commercial enterprises) from the rule of *Mescalero* rule by accepting, into trust, land not heretofore included within or associated in any way with an established Indian reservation? This is the real significant issue present in this case, and the one which we urge the Court to consider after granting plenary review.

In *Mescalero* the Court declined the "invitation to resurrect the expansive version of the intergovernmental immunity doctrine that has been so consistently rejected in modern times." 411 U.S. 145, 155. Is 25 C.F.R. § 1.4, and the lower court's treatment of it and 25 U.S.C. § 465, an attempt, unconscious perhaps, to resurrect that doctrine, and to apply it to the state's regulatory and police powers, as well as its taxing power? The Court should, we submit, carefully consider that question as well when determining whether or not to grant the writ in this case.

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[5]Even within a reservation, mere restricted ownership of land may not carry all of the protective armor which it is often claimed to wear. See, *United States v. Mitchell*, 445 U.S. 535 (1980).

CONCLUSION

We cannot improve on the District Court's words, found in its memorandum opinion of August 31, 1978 on Defendant's Motion to Dismiss (Pet. App. 39a):

> "* * * The creation of discreet enclaves of Indian reservation land within the organized municipalities creates havoc as the city or county attempts to enforce its criminal, health and land use ordinances. There are, of course, strong equitable considerations on both sides of this dispute. * * *"

There are also strong doubts as to the correctness of the lower court's view of the ouster of state and local jurisdiction under the circumstances of this case, as well as doubts as to the existence of any Congressional authority for such a drastic administrative alteration in the jurisdictional relationship between a state and its land and citizens. This case presents a significant issue of national scope, and important questions of federal law as yet unsettled. Certiorari should be granted and the case set down for plenary review on the merits.

Respectfully submitted,

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